No. 10148

In the United States Circuit Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

J. G. BOSWELL COMPANY AND CORCORAN TELEPHONE EXCHANGE, RESPONDENTS

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR RESPONDENTS

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SUBJECT INDEX

AUTHORITIES CITED

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PRELIMINARY STATEMENT

The case is an original proceeding in this Court on the petition of the National Labor Relations Board for an order of enforcement.

The original charge in this case which was against respondent J. G. Boswell Company alone, herein called Boswell Company, was filed November 21, 1938, by E. F. Prior of the California State Council of Soap and Edible Oil Workers, A. F. of L. with the Regional Director for the Twentieth Region (San Francisco, California). The Board thereafter ordered the case transferred to and continued in the Twenty-first Region (Los Angeles, California). The original charge was never served on said respondent. An amended charge against said respondent was filed by E. F. Prior

January 17, 1939, but was never served. A second amended charge against said respondent was filed by A. H. Petersen of the A. F. L. February 6, 1939, but was never served. A third amended charge against said respondent and Associated Farmers of Kings County, Inc. was filed March 4, 1939, and on said date the original complaint was issued and an order was made setting the case for hearing on March 13, 1939. After the case had been set for hearing, the matter was indefinitely continued by order of the acting Regional Director, Twenty-first Region, dated March 6, 1939, without any reasons given therefor. Thereafter on May 4, 1939, a fourth amended charge was filed by E. F. Prior against respondent Boswell Company, respondent Associated Farmers of Kings County, Inc., and respondent Corcoran Telephone Exchange, herein called Exchange. This fourth amended charge, as well as most of the previously amended charges, was filed by Cotton Products and Grain Mill Workers Union, Local No. 21798, A. F. L., and was signed by E. F. Prior, Business representative. (R. 3; 11). On May 6, 1939 the case was set for hearing and an amended complaint was issued against all three of said respondents, and an order was made setting the case for hearing on May 18, 1939. (R. 11; 26). The hearing before the Trial Examiner was concluded June 16, 1939. The Intermediate Report was issued by the Trial Examiner January 11, 1940 and was served on respondents Boswell Company and the Exchange on January 25, 1940. On or about March 15, 1940 the respondents served and filed their exceptions to the Intermediate Report, and

on March 20, 1940 filed a brief with the Board. The Board's purported Decision and Order was made September 29, 1941 and was received by respondents Boswell Company and the Exchange on October 1, 1941. The Petition for enforcement of such purported order and decision was filed with this Court on May 27, 1942.

The Board in its purported Decision and Order found that the respondent Associated Farmers of Kings County, Inc. had not engaged in unfair labor practices within the meaning of Sections 8 (1), (3) and (4) of the National Labor Relations Act, herein called the Act, and dismissed the complaint as to said respondent. The Trial Examiner in his Intermediate Report and the Board in its purported Decision and Order dismissed certain of the charges contained in the amended complaint upon which the case went to hearing as to the respondents Boswell Company and Exchange. We will, therefore, confine ourselves in this brief only to those charges and matters upon which the Board found and held adversely to respondents Boswell Company and Exchange.

Paragraph 1 of the Amended Complaint (R. 11; Board's Exhibit No. 1-S) alleged that the Boswell Company was a California corporation engaged in the business of growing and financing the growing of cotton, feeding cattle, ginning and baling cotton, extracting cottonseed oil from cotton seed, and processing, selling and distributing cotton, cottonseed oil and cottonseed cake and meal. It was also alleged that the Boswell Company operated offices gins and oil mills at certain named locations in California and in Arizona. The

Boswell Company in its answer admitted in substance those allegations with certain corrections as to the location of its offices and plants.

Paragraph 3 of the Amended Complaint alleged that the Exchange was a California corporation engaged in operating a telephone system and transmitting and receiving telephonic communications in Corcoran, California, and that it owned and operated lines and cables which connected with lines and cables of Pacific Telephone & Telegraph Company, and that through such connections the Exchange transmitted telephonic communications in interstate commerce. The Exchange in its answer admitted that it was a California corporation and was engaged in the business of operating a telephone system, transmitting and receiving telephonic communications in Corcoran, California. It admitted that it owned and operated lines and cables which connected with lines and cables of Pacific Telephone & Telegraph Company and that it transmitted telephonic communications in interstate commerce through such connections, but alleged that no substantial amount or number of telephonic communications transmitted over its system were transmitted in interstate commerce and that the total number and amount of telephonic communications which were transmitted over its system in interstate commerce was considerably less than 1% of the number and amount of toll messages handled through its system.

Paragraph 4 of the Amended Complaint alleged that the Boswell Company in its business caused large quantities of materials, consisting of burlap and metal

bands to be purchased and transported in interstate and foreign commerce to Corcoran and caused in excess of 50% of all cotton, cottonseed oil, cottonseed cake and meal purchased, processed, produced and baled by it to be transported in interstate and foreign commerce. Boswell Company admitted that it caused large quantities of materials, consisting of burlap and metal bands, to be purchased and transported in interstate and foreign commerce to Corcoran but denied all the remainder of paragraph 4.

Paragraphs 6 and 7 of the Amended Complaint alleged that the Boswell Company engaged in unfair labor practices within the meaning of Section 8 (1) of the Act by criticizing and condemning the Union through alleged supervisory employees. Boswell Company denied the allegations in said paragraphs and alleged that if any such acts or statements were done or made they were unauthorized and were not expressions of the Boswell Company.

Paragraphs 8 to 14 of the Amended Complaint as amended during the hearing alleged that the Boswell Company engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act in doing the following acts because of the union activities of the employees hereinafter mentioned:

1. It discharged James W. Gilmore on or about March 20, 1938 and refused to reinstate him on or about July 1, 1938.

2. It discharged W. R. Johnston, Stephen J. Griffin and Elmer Eller on or about November 17, 1938.

3. It discharged Eugene Clark Ely on or about January 30, 1939.

4. It shut down the oil mill and locked out Boyd Ely and Walter Winslow on or about November 15, 1938 and refused to re-employ them when the oil mill re-opened on or about January 6, 1939.

5. It reduced the wages of L. E. Ely from 40c to 35c per hour on or about November 13, 1938 and refused to re-employ him on or about December 2, 1938.

6. It encouraged and permitted an anti-union demonstration at its plant on or about November 18, 1938 and permitted employees and supervisory employees to drive George J. Andrade, Joe Briley, O. L. Farr, R. K. Martin, E. C. Powell, L. A. Spear and H. N. Wingo from their work, and it failed to reinstate them on or about November 19, 1938.

The Boswell Company denied all of the foregoing allegations and alleged that Johnston, Griffin and Eller were employed in seasonal work; that there was a very short ginning season in 1938; that as a result its ginning operations were curtailed earlier than normal and that those men were laid off solely by reason of the seasonal decline in operations. It also alleged that Eugene Clark Ely left its employ on January 30, 1939 of his own free will and while work was still available to him and that he was neither laid off nor discharged.

In Paragraphs 15 to 19 of the Amended Complaint it was alleged that the Boswell Company engaged in unfair labor practices within the meaning of Sections 8 (1) and (2) of the Act by forming at its Corcoran

plant a labor organization known as "J. G. Boswell Company Employees Association of Corcoran and Tipton," hereinafter called the Association, through supervisory employees, who actively participated in the formation, and became officers and members of the Association. It was also alleged that said respondent dominated and interfered with the Association by permitting the Association to hold meetings at the plant, by threatening employees with loss of employment if they did not join the Association, by increasing wages and the amount of employment of members of the Association, and by soliciting members during working hours. The Boswell Company denied all of those allegations.

Paragraph 20 of the Amended Complaint alleged that because of the alleged unfair labor practices, the Cotton Products and Grain Mill Workers Union, Local No. 21798 A. F. L., hereinafter called the "Federal," instituted a boycott about January 20, 1939 and stationed pickets at the Boswell plant, and that said activities were being carried on at the time of the issuance of the complant on May 6, 1939. The Boswell Company denied that it engaged in any unfair labor practices, but admitted the existence of the boycott and picket lines.

Paragraphs 24 to 26 of the Amended Complaint alleged that respondents Boswell Company and Exchange restrained the Boswell Company employees in their rights under Section 7 of the Act, and engaged in unfair labor practices within the meaning of Sections 8 (1) and (3) by discharging and causing to be

discharged Margaret A. Dunn from her employment with the Exchange, because they **suspected** her of engaging in union activities. It was alleged that respondent Exchange acted directly and indirectly in the interest of the Boswell Company in discharging, and causing to be discharged, Margaret A. Dunn. Both respondents denied the foregoing allegation.

Paragraph 29 of the Amended Complaint alleged that the Exchange by refusing to reinstate said Margaret A. Dunn on or about March 14, 1939 to her regular position of employment with the Exchange restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act, and thereby engaged in unfair labor practices within the meaning of Section 8 (1) of the Act. The Exchange admitted that it refused to reinstate, or permit the reinstatement of Margaret A. Dunn on or about March 14, 1939, and alleged that the sole and only reason for the refusal to reinstate her was that her employment had previously been terminated for good cause. It also denied that it had engaged in any unfair labor practices. The Boswell Company denied these allegations of the Amended Complaint and alleged that whatever acts or things were done by the Exchange were done independently of and without the knowledge of the Boswell Company and denied that the Exchange ever acted directly or indirectly in the interest of the Boswell Company.

Paragraphs 32 and 35 of the Amended Complaint alleged that the foregoing alleged acts of the Boswell Company constituted unfair labor practices within

the meaning of Sections 8 (1), (2), and (3) and Sections 2 (6) and (7) of the Act, and that those acts had a close, intimate and substantial relation to interstate and foreign commerce and tended to lead to labor disputes burdening interstate commerce. The Boswell Company denied these allegations.

Paragraphs 34 and 37 of the Amended Complaint alleged that the alleged acts of the Exchange set forth in the complaint constituted unfair labor practices affecting commerce within the meaning of Sections 8 (1) and (3) and Sections 2 (6) and (7) of the Act, and that said acts occurring in connection with the operations of the Exchange and the operations of Boswell Company had a close, intimate and substantial relation to interstate commerce and tended to lead to labor disputes burdening and obstructing the free flow of commerce. The Exchange denied the foregoing allegations, and Boswell Company denied these allegations upon lack of knowledge.

Upon their first appearance in the case the Boswell Company and the Exchange each filed its objections to the jurisdiction of the Board and denied it was subject to the Act by filing a motion to dismiss the charges on the following grounds:

That no act of the respondent or to which the respondent is a party is in commerce or affects commerce or burdens or obstructs commerce or the free flow of commerce or had led or tended to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce, and upon the further

ground that the Board had no jurisdiction over the respondent. (R. 726; 729)

Upon the opening of the hearing before the Trial Examiner each of said respondents stated its said objections to the jurisdiction of the Board, and moved that the proceedings be dismissed as to each of said respondents on said grounds. The Trial Examiner denied each of said motions. At the conclusion of the testimony offered by the Board respondent Corcoran Telephone Exchange renewed its said objections and motions on all of the grounds stated in its written motion to dismiss, and upon the further ground that Mrs. Dunn herself testified that she was not a member of any labor organization and had never engaged in any union activities, and that any redress so far as she is concerned is beyond the scope of the Act. This motion was likewise denied by the Trial Examiner. At the conclusion of the hearing before the Trial Examiner respondent Corcoran Telephone Exchange renewed its said objections and motions by moving to strike out all of the testimony adduced on behalf of the Board purportedly in support of the complaint against said respondent on the ground that the Board had no jurisdiction over said respondent or its business in that it had not been shown that said respondent is engaged in interstate commerce, nor that the conduct of its business in any manner affected interstate commerce; and upon the further ground that there had been no showing in the case that Mrs. Dunn is a person who ever joined a labor organization, or assisted one, or in any manner attempted to assist

one, and that, therefore, she is not a person to whom the rights referred to in Section 7 and Section 8 (1) of the Act are secured. This motion was taken under advisement, and the Trial Examiner in the Intermediate Report denied said motion. The Board in its purported Decision and purported Order affirmed the overruling by the Trial Examiner of the objections made by said respondents and the denial of said motions.

In their exceptions to the Intermediate Report of the Trial Examiner the respondents renewed their objections to the jurisdiction of the Board and excepted to the rulings of the Trial Examiner in denying their motions made at the time of the hearing.

In their answer filed with this Court to the petition of the Board for an order of enforcement respondents have again pleaded and asserted the defenses that they are not, and neither of them is, subject to the Act, and that the Board was and is without jurisdiction and they have, and each of them has, moved this Court for an order of dismissal of the petition.

By this brief the respondents again assert that they are not, and neither of them is, subject to the Act and renew their objections to the attempted jurisdiction of the Board, and move that the petition of the Board for an order of enforcement be dismissed.

Expressly reserving their objections to the jurisdiction of the Board, respondents have also resisted the proceedings on their merits.

The Board in its purported Decision and Order absolved Respondent Boswell Company from any and

all responsibility with respect to the discharge by the Exchange of Margaret A. Dunn. The Board also dismissed the Amended Complaint insofar as it alleged that Boswell Company engaged in unfair labor practices within the meaning of Section 8 (3) of the Act with respect to Gilmore, Boyd Ely, Winslow, Johnston, Griffin, Eugene Clark Ely and Elmer Eller. The Board held, however, that both respondents had interfered with, restrained and coerced their employees in the exercise of the rights guaranteed in Section 7 of the Act, and had engaged in unfair labor practices within the meaning of Section 8 (1) of the Act; that respondent Boswell Company had dominated and interfered with the formation and administration of the Association and by contributing financial and other support thereto had engaged in unfair labor practices within the meaning of Section 8 (2) of the Act; and that both the Boswell Company and the Exchange had engaged in unfair labor practices within the meaning of Section 8 (3) of the Act by discriminating in regard to the hire and tenure of employment of their employees and thereby discouraged membership in the Federal; and that said unfair labor practices are unfair labor practices affecting commerce, within the meaning of Section 2 (6) and (7) of the Act.

The Board, however, did not find that the Exchange in discharging Mrs. Dunn acted either directly or indirectly in the interest of the Boswell Company.

The Board with respect to Boswell Company made a cease and desist order and ordered said respondent

to reinstate Spear, Martin, Wingo, Andrade, Farr, Powell, and Elgin Ely and to pay each of them as back wages a sum of money equal to that which he would normally have earned as wages from the date of discrimination to the date of said respondent's offer of reinstatement, less his net earnings during such portions of said period when he would normally have been working for said respondent; and less any sums already paid to him by said respondent for days of work subsequent to November 18, 1938, when he was not actually working at its plant.

The Board ordered Gilmore, Boyd Ely, Winslow, Johnston, Griffin and Eugene Clark Ely placed upon a preferential hiring list. The Board also ordered that the Boswell Company refuse to recognize the Association as the representative of any of its employees for the purpose of dealing with said respondent concerning wage and employment matters and that said respondent post notices of compliance. The Board also ordered that the Exchange immediately reinstate Mrs. Dunn with back pay and post notices of compliance.

In addition to the jurisdictional question herein above mentioned and which is hereinafter more fully discussed, each of the respondents contends that the findings that it violated the Act and that the Board's cease and desist order and order for affirmative action are and each of them is (a) contrary to fact; (b) contrary to law, and (c) not supported by substantial evidence.

In their answer to the Board's petition for an

order of enforcement each of the respondents has alleged by way of special defenses:

1. That the Board has been and is guilty of nonfeasance and neglect of duty in that it failed for a period of approximately eight months after the date of its purported Decision and Order to take any action for the enforcement thereof.

(a) Said purported Order of the Board was made at a time so remote from the present that it is impossible to ascertain from the record the present status of any of the alleged employees of the respondents for whose benefit said purported Order runs;

(b) It is impossible to ascertain from the record or otherwise what any of the alleged employees of respondent J. G. Boswell Company would normally have earned as wages from said respondent subsequent to the date of termination of his employment.

(c) It is impossible to ascertain from the record what, if any, other employment said alleged employees of each of the respondents have received from or after the time of the close of the hearing before the Trial Examiner in said case.

(d) It is impossible to ascertain whether or not any of said alleged employees have received employment substantially equivalent to that held by them with the respective respondents before the termination of their employment.

(e) It is impossible to determine from the record what efforts, if any, said alleged employees, or any of them, have made to secure other and substantially equivalent employment to that held by them with the

respective respondents at any time since the termination of their employment with the respective respondents.

2. That the Board has been and is guilty of nonfeasance and neglect of duty in that it failed to take any evidence on the question of whether or not any of the said alleged employees of either respondent made any effort to obtain other or substantially equivalent employment after the termination of their employment by the respective respondents; and that such failure has voided the purported Order of the Board.

3. That the proceeding was not prosecuted fairly and impartially and in good faith, and the Intermediate Report of the Trial Examiner and the purported Order and Decision of the Board is contrary to law and void by reason of misconduct and misfeasances of the Trial Examiner; and

4. That the Board has been and is guilty of nonfeasance and neglect of duty in that it unduly delayed the prosecution of the case with the result that the respondents will be greatly prejudiced should the court grant the Board's petition for the enforcement of its purported Orders.

I.

THE JURISDICTIONAL ISSUES

(A) J. G. BOSWELL COMPANY.

The only evidence relating to the nature of the business carried on by the Boswell Company was a

stipulation entered into between the attorneys for the Board and the attorneys for said respondent. (R. 715; Board's Exhibit No. 2). This stipulation set forth the nature and extent of the respondent's operations only during the fiscal year from July 1, 1937, to June 30, 1938. There was no stipulation, however, that said respondent was within the jurisdiction of the Board or that it was engaged in commerce within the meaning of the Act or that any activities of said respondent affected commerce within the meaning of the Act. None of the matters involved in this proceeding occurred during the period of time covered by the stipulation nor was a showing of any nature made regarding the business carried on by said respondent at any of the times involved in this proceeding. Neither was there any showing that any of the operations here in issue were related to interstate commerce or could have in any manner affected, obstructed or burdened interstate commerce within the meaning of the Act.

(B) CORCORAN TELEPHONE EXCHANGE

Respondent Exchange is a California corporation which transacts all of its business and carries on all of its operations exclusively within the city limits of Corcoran, California (R. 2461; 2485). It has only about 300 subscribers (R. 2493). It is a purely local telephone exchange, entirely separate and independent from Pacific Telephone & Telegraph Company and from American Telephone & Telegraph Company. All of the cables and wires of said respondent are within the city limits of Corcoran and it has no subscribers

for its service outside of that city. Pacific Telephone & Telegraph Company maintains a cable, containing six or seven wires, into the City of Corcoran from points outside of the city. That company has connected its cables to the switchboard owned by respondent Exchange, and those cables are owned, maintained and repaired by Pacific Telephone & Telegraph Company without any participation therein by respondent Exchange (R. 3221, 3222). An operating agreement has been entered into between respondent Exchange and Pacific Telephone & Telegraph Company whereby persons wishing to call points outside of the City of Corcoran may be connected with the cable of Pacific Telephone & Telegraph Company, and, through the facilities of the latter company, may make long distance calls. In consideration for the privilege granted by the Exchange to Pacific Telephone & Telegraph Company, respondent Exchange receives 30% of the tolls on outgoing calls over the Pacific Telephone & Telegraph Company cables, and the latter company retains the remaining 70%. The Exchange receives nothing upon incoming calls unless they happen to be collect calls. (R. 2016; 2017).

During the fiscal year 1938 the gross income of respondent Exchange was $15,897.39. This included income from subscribers and toll calls which are the only sources of income. This gross income, however, included taxes in the amount of $937.35 collected on toll calls (R. 2471), which made the gross income from subscribers and toll calls only the sum of $14,960.04 (R. 2471; 2472). Of this revenue, $5,248.48 was the

amount the Exchange received from toll calls over the facilities of Pacific Telephone & Telegraph Company (R. 2472). Although some of the toll calls handled by the Exchange went out of state the total charges for such out of state calls was only $177.13 (R. 2472; 2487; 2488). Said sum of $177.13 was approximately 3⅓% of the total amount received for toll calls during that year (R. 2472; 2473). However, the Exchange, under its working agreement with Pacific Telephone & Telegraph Company, received only thirty per cent of the sum of $177.13 or $53.14 (R. 2487; 2488; 2490). On a value basis, this would be approximately one per cent of the total sum of $5,248.48 received for toll calls during the year, and would be approximately one-third of one per cent (.0355) of the gross income of $14,960.04.

In 1938 the total number of toll calls which went through the Exchange was 35,558, and of this number 77 were out of state calls (R. 2474). This however, did not include inumerable local calls handled by the Exchange, no record of which was kept (R. 2489). These 77 out of state calls were approximately one-fifth of one per cent (.00216) of the total of 35,558 toll calls (R. 2486, 2487).

No showing was made that respondent Exchange was the only telephone connection in the City of Corcoran through which calls could be made to points outside the city, and, in fact, the evidence showed on the contrary that the facilities for such calls were maintained by Pacific Telephone & Telegraph Company, rather than by respondent Exchange.

The only other evidence which might have any bearing on the matter of jurisdiction was the following:

(a) Glenn testified that both the Western Union Company and the Atchison, Topeka & Santa Fe Railroad were subscribers to the Exchange (R. 2477, 2478). However there was no evidence as to the volume of business transacted over the system by these two subscribers. Glenn testified that the Exchange had no agreements or working agreements with the Western Union, and did not serve them in any way at all (R. 2476), and that if anyone wanted to send a telegram and phoned it in to the telephone office they would not take it there, but it would have to be taken over at the Santa Fe (R. 2476), and that the Exchange did not relay any messages for the Western Union, and if the agent at the Santa Fe, who handles the Western Union messages, desired to deliver such message over the telephone he would have to call the party and give the message, but the Exchange did not take any responsibility in delivering such messages, and Glenn did not know if the Western Union agent used the telephone lines of the Exchange to deliver messages (R. 2477).

(b) Glenn testified that during the past year the Exchange installed a new cable to replace some old cable and make additions, and that this cable although ordered from the Graybar Electric Company, of San Francisco, was shipped from some point in Illinois (R. 2492). However, he testified that the order for this

cable was placed with the Graybar Electric Company in San Francisco, and that he had no communication whatsoever with anyone outside the State of California with respect thereto. He also testified that the Exchange buys its wire from the Graybar Electric Company in San Francisco and some from the Kellogg Switchboard and Supply Company in Los Angeles (R. 2493); that the Exchange buys its telephone poles principally from the San Joaquin Light & Power Company, and some from the Graybar Electric Company, but that it has no material or equipment of any type that was purchased from points outside the State of California. Switchboards are likewise purchased from Graybar (R. 2494, 2495), and, so far as he knew, Graybar manufactured their own switchboards, at least they are so marked, and also manufactures wire used by the Exchange (R. 2495).

The evidence showed that the number of calls and the amount of income from calls to points outside the state were not substantial but were, in fact, trivial, and there was no showing that any obstruction to the operations of respondent Exchange would tend to burden or obstruct the free flow of commerce within the meaning of the Act.

It seems clear, in view of the decisions, that the business and operations of the Exchange standing alone do not justify the Board in assuming jurisdiction, as it has been decided in a number of cases that the fact that an intrastate concern may engage, to a limited extent, in interstate commerce, or that its operations may indirectly affect interstate commerce, is not suffi-

cient to give the Board jurisdiction or alter the intrastate character of the business.

In **National Labor Relations Board v. Bradford Dyeing Ass'n.** (1st Circuit, Aug. 1939) 106 F. (2d) 119 the court stated at page 122:

> "The shipment of 1 percent of the cloth processed in the form of remnants or 'rags', consisting of the 'torn ends' of the pieces processed, which the respondent was permitted by the customer to have and sell, and which it sold in New York, is so remote from the main purpose of its business and is simply only a mere incident thereof, that Congress could not have intended that such transactions alone could subject the entire business of a plant to the penalties that may be imposed by the Labor Board under the Act."

In **National Labor Relations Board v. Idaho-Maryland Mines Corp.,** 98 F. (2d) 129 (C. C. A. 9th, 1938), the court said at page 121:

> "Nor is the Board's assumption of jurisdiction warranted by the fact that the United States, after purchasing respondent's product and commingling it with other gold and silver, ships the commingled product from its San Francisco mint to its Denver mint for safe keeping. **Respondent does not make these shipments or cause them to be made.** We regard such shipments, not as commercial transactions, but as administrative acts of Government. **If, however, such acts may be said to constitute commerce, it is a commerce to which respondent's activities are not closely, intimately or substantially related, and which respondent's labor practices do not directly or substantially affect."**

In **Consolidated Edison Co. v. National Labor Relations Board,** 305 U. S. 197, 63 L. Ed. 126, the Supreme Court in holding that the Board had jurisdiction

in the case of an intrastate public utility company considered the interstate character of the instrumentalities served by the respondent. However, the evidence in the present case did not show any dependence of any such interstate instrumentalities upon the Exchange as was shown in that case.

The question of the effect of the labor relations of a business upon interstate commerce was considered in **National Labor Relations Board v. Jones & Laughlin Steel Corporation,** 301 U. S. 1, 81 L. Ed. 893. In that case the court stated:

> "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control. A. L. A. Schechter Poultry Corporation vs. United States, supra. **Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. The question is necessarily one of degree."** (pp. 911, 912).

Similarly, in another statement demarking the limits of the Board's power, the Supreme Court, in **Santa Cruz Fruit Packing Company v. National Labor Relations Board,** 303 U. S. 453; 82 L. Ed. 954, said at pp. 960-961:

> "It is also clear that where federal control is

sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our constitutional system. The subject of federal power is still 'commerce', and not all commerce but commerce with foreign nations and among the several states. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. A. L. A. Schechter Poultry Corp. vs. United States, 295 U. S. 495, 546; 79 L. Ed. 1570, 1588; 55 S. Ct. 837, 97 A. L. R. 947. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' Id., p. 554."

"To express this essential distinction, 'direct' has been contrasted with 'indirect' and what is 'remote' or 'distant' with what is 'close' and 'substantial.' Whatever terminology is used, the criterion is necessarily one of degree and must be so defined . . .

The question that must be faced under the Act upon particular facts is whether the unfair labor practices involved have such a close and substantial relation to the freedom of interstate commerce from injurious restraint that these practices may constitutionally be made the subject of federal cognizance through provisions looking to the peaceable adjustment of labor disputes."

In the Santa Cruz Packing Company case, supra, about 37% of the respondent's products were shipped in interstate commerce, but there the actual effect of unfair labor practices involved upon interstate commerce had been clearly demonstrated. In the instant case, the evidence showed without dispute that only an

infinitesimal amount of the business handled by the Exchange was in interstate commerce and there was absolutely no showing that any alleged unfair labor practices of the Exchange would affect interstate commerce in the slightest. If any alleged unfair labor practices of the Exchange could affect interstate commerce, it is clear that the effect would be remote, indirect and unsubstantial.

The Board contends that respondent Exchange is an instrumentality of interstate commerce, and that upon the basis of the Court's decision in **N. L. R. B. v. Central Missouri Telephone Co., 115 F. (2d) 563** (C.C. A. 8) and the decisions referred to in said case, the Board has jurisdiction over the Exchange. We respectfully submit and contend, however, that the facts in the Central Missouri Telephone Co. case are so dissimilar from the facts of the instant case that said decision is in no way controlling in the instant case.

In the Central Missouri Telephone Company case, supra, the respondent company maintained or controlled 27 telephone exchanges in the State of Missouri, 24 of which were directly connected with the facilities of the Bell Telephone System. These exchanges handled and did a large volume of business, both intrastate and interstate. The revenue derived from the transmission of interstate messages was quite substantial and amounted to 13.2% of the annual gross income. The volume of messages transmitted in interstate commerce amounted to 7.6% of the total messages completed each month. The respondent company in addition to having its telephone facilities in the State of Missouri

had and maintained its general office in the State of Iowa. The stock of the respondent company was, with the exception of a few shares of directors qualifying stock, owned and held entirely by a Delaware corporation, a foreign corporation. This foreign corporation also owned or controlled a number of other telephone companies which had their general offices in the same city in Iowa. The respondent company also purchased large quantities of materials outside of the State of Missouri which were shipped into the state in interstate commerce. The respondent company had a gross annual income of about $170,000.00. The Board in said case found and held that the respondent company was **actually engaged** in interstate commerce and was not merely an instrumentality of interstate commerce. It it is clear that the Court's decision in said case did not rest entirely upon the additional finding that the respondent company was an instrumentality of interstate commerce. It also appears that in said case there was an actual labor dispute involving the plant department employees of the respondent company.

In the instant case the evidence, as hereinabove set forth, shows without any contradiction or dispute whatever:

(a) That all of the plant and facilities of the Exchange are located entirely within the small city of Corcoran in the State of California;

(b) That the Exchange has only about 300 subscribers;

(c) That its gross annual income is less than $15,000.00;

(d) That on a value basis the annual revenue derived from interstate messages is only approximately ⅓ of 1% (.0355) of the gross annual income;

(e) That the number of interstate messages amounts to only approximately 1/5 of 1% (.00216) of the total number of annual toll calls;

(f) That the majority of the stock is owned by Mr. C. H. Glenn, the president and general manager of the company who is a resident and citizen of California (R. 3219);

(g) That the Exchange has no office anywhere except in the City of Corcoran;

(h) That it purchases all of its materials, supplies and equipment in the State of California (R. 2491-2495); that it is not actually engaged in interstate commerce and that it has no labor dispute with anyone.

The Board in its purported Decision and Order found that the income of the Exchange from calls to points outside the State of California, during the fiscal year 1938, was $177.13. (R. 516). This finding is not in accordance with the evidence which as hereinabove set forth showed that the Exchange under its working agreement with Pacific Telephone & Telegraph Company received only 30% of said sum of $177.13, or only $53.14. (R. 2487, 2488; 2490).

The Board also found that at least three of the Exchange's customers are engaged in interstate commerce, namely, Western Union Telegraph Company, Atchison, Topeka and Santa Fe Railroad and respondent Boswell Company. (R. 515). However, as hereinabove pointed out, there was no evidence whatever

regarding the nature or extent of the business carried on by respondent Boswell Company at any of the times involved in this proceeding, nor was there any showing whatever that any of the operations of respondent Boswell Company in issue in this case were related to interstate commerce or could have in any manner affected, obstructed or burdened interstate commerce within the meaning of the Act; the Board having rested its case as to the matter of its jurisdiction of Boswell Company solely upon a stipulation as to the operations of said respondent during the one year period ending June 30, 1938.

No evidence whatever was offered or introduced which would tend to establish that Western Union Telegraph Company was or is engaged in interstate commerce. The Board in finding that said Company is engaged in interstate commerce went entirely outside the record.

The only evidence showing or tending to show that Pacific Telephone & Telegraph Company is engaged in interstate commerce was the annual report of said company for 1938. (R. 2466; Board's Exhibit No. 20 (a), and the annual report of American Telephone & Telegraph Company for 1938, (R. 2467; Board's Exhibit 20 (b). Both of these exhibits were erroneously admitted in evidence by the Trial Examiner over the objections of the respondents. The respondents conceded the authenticity of each of said documents but objected to their introduction in evidence on the ground that each of the exhibits was incompetent, irrelevant and immaterial and was hearsay as to the respondents,

and upon the further ground that there had been no showing whatsoever concerning the Board's jurisdiction over the respondent Exchange, or that said respondent acted in the interest of anyone who is subject to the Board's jurisdiction or is an employer within the meaning of the Act; and upon the further ground that there had been no connection shown between the Exchange and either of the companies mentioned in said documents, that is, the American Telephone & Telegraph Company or the Pacific Telephone & Telegraph Company. (R. 2465; 2466).

The statements and arguments made by the Board in its brief to the effect that the Exchange is part of the Bell Telephone System (Brief pp. 5 and 6) are predicated entirely upon the annual report of the Pacific Telephone & Telegraph Company and American Telephone & Telegraph Company, which, as above mentioned, were erroneously admitted in evidence, and upon reports of the Federal Communications Commission cited in the brief which were not even offered in evidence and consequently constitute no part of the case.

Furthermore, the Board failed to show that Mrs. Dunn, the only employee of the Exchange involved in this proceeding, came within any provisions of the Act or that she was entitled to any relief thereunder.

The undisputed evidence shows: (a) There was no current labor dispute, or labor dispute of any kind, between the Exchange and any of its employees. (b) Mrs. Dunn herself testified that she was not a member of **any** labor organization, and in particular was not a member of any labor organization with which Mr.

Prior was connected. (R. 2574) In fact she was not even eligible for membership in the Federal, for, as found by the Board the Federal was organized for the purpose of admitting to its membership employees of the Boswell Company. (R. 517). She also testified that she had not in any manner assisted or attempted to assist any such labor organization. (R. 2574, 2575). Her above mentioned testimony was corroborated by that of her husband, John Ernest Dunn. (R. 2571, 2573).

There was no evidence showing either: (a) That the Exchange in discharging Mrs. Dunn acted either directly or indirectly in the interest of the Boswell Company; and in fact neither the Trial Examiner nor the Board found that it did so act.

(b) That the discharge of Mrs. Dunn had any effect whatsoever upon the Federal or upon any employee of the Boswell Company, or upon any employee whomsoever.

(c) That the discharge of Mrs. Dunn did or could in anywise or to any extent affect commerce within the meaning of the Act; or

(d) That the Exchange, following the discharge of Mrs. Dunn, ever replaced her with a new employee.

The respondents respectfully submit and contend that the Board wholly failed to establish that it has jurisdiction over either of the respondents, and that regardless of any question of jurisdiction insofar as respondent Exchange is concerned, there was absolutely no showing or proof that the Act applies to Mrs. Dunn or that she is entitled to any relief thereunder.

II.

THE CHARGES AGAINST RESPONDENT BOSWELL COMPANY

A. THE FACTS:

In view of the voluminous records in this case and in order that the court may have a better understanding of the matter we are herewith setting forth a chronology and brief summary of the pertinent facts with respect to respondent Boswell Company.

The evidence showed that the business conducted by respondent Boswell Company is a highly seasonal business, and the Board so found. The Corcoran plant consists of six cotton gins, a cottonseed oil mill, a mixed feed plant, a cattle feed yard, (R. 716) and a machine shop, blacksmith shop and garage conducted in conjunction with its gins and mill. (R. 2992). The operation of the gins is dependent upon the amount of cotton which is available in that vicinity for ginning and processing each year. The ginning season is coextensive with the cotton picking season, which commences in the fall of each year and usually ends during the latter part of the same year, or the early part of the following year.

The operation of the cottonseed oil mill is likewise dependent upon the amount of cotton ginned. The oil mill is operated only a small portion of the year to crush the seeds which are received from the gins.

The uncontradicted evidence showed that the season here in question, namely, the season commencing

in the fall of 1938, was a very short season. The amount of cotton available for ginning during that season was greatly reduced by reason of the flood of Tulare Lake, in the vicinity of Corcoran, and the government crop control program. In order to illustrate the reduction in the amount of work available at the plant of respondent Boswell Company during the times here involved, we will set forth herein a comparison of the operations for the season here in question with the preceding season. The season commencing in the fall of 1937 is designated as the 1937-38 season, and the season commencing in the fall of 1938 is designated as the 1938-39 season.

(1) **Operation of Gins.**

1937-38 Season

Commenced about September 20, 1937.

Less than a week after commencing, all six gins were operating 24 hours a day with two shifts of 12 hours each. All gins were operated full time until the middle of December, 1937. Two gins were then shut down and four gins operated until the middle of January, 1938. Two gins were then shut down and two gins operated two or three weeks longer. One gin was then shut down and the remaining gin operated until the season ended in the latter part of February, 1938. (R. 2992-2994).

1938-39 Season.

One gin was started September 30, 1938. Two or three days later three more gins were started. Only four gins operated at any time during the entire sea-

son. They were **operated with only one shift** of men per day, the hours operated each day being dependent entirely on the amount of cotton brought in. On some days some of the gins operated only a few hours and on some days some of the gins did not operate at all.

No. 4 gin started October 3, 1938 and closed November 25, 1938 and did not operate thereafter. During this period there were some days when this gin did not operate at all and some days when it operated less than 12 hours.

No. 2 gin started October 3, 1938 and closed December 3, 1938 and did not operate thereafter.

No. 1 gin started September 30, 1938 and closed December 5, 1938, after which it ran part-time until December 30, 1938. About one-half of the days during the period from December 5 to December 30, 1938, that gin was not operating at all, and some days during that period it operated only 2 or 3 hours or half a day.

No. 3 gin started October 1, 1938 and closed January 24, 1939, but operated only part-time during that period because of lack of cotton. (R. 3002-3005).

(2) **Total Amount of Cotton Ginned.**

1937-38 Season	**1938-39 Season**
47,250 bales	9,944 bales

(R. 3000).

(3) **Operation of the Oil Mill.**

The oil mill is operated according to the amount of cotton seed which the company has on hand and according to market conditions. Occasionally some of the seed in storage heats up and it is necessary to mill

this "hot seed" in order to keep it from spoiling. The evidence showed that one of the main purposes of maintaining the cattle feed yard at Corcoran is to provide an outlet for cottonseed cake and sometimes it is necessary to operate the mill for a few days to furnish feed for the cattle.

The following operations of the oil mill were to crush seeds from the cotton ginned during the 1937-38 ginning season:

Commenced.	Closed.
September 20, 1937	March 7, 1938
May 3, 1938	May 17, 1938
July 1, 1938	September 27, 1938

The following operations of the oil mill were to crush seeds from cotton ginned during the 1938-39 ginning season:

Commenced.	Closed.
October 24, 1938	November 15, 1938
January 5, 1939	January 12, 1939
February 22, 1939	February 24, 1939
April 29, 1939	May 2, 1939

The mill also ran two days in the early part of June, 1939.

The operation of the mill for the two days in February above specified was caused by hot seeds, and the two short runs in April and June were caused by a shortage of feed (R. 3006-3008).

(4) **Total Amount of Seed Crushed in Mill.**

1937-38 Seed.	1938-39 Seed.
23,716 tons	5,668 tons

(R. 3000-3002).

(5) **Planting Seed.**

In order to obtain cotton planting seed it is the practice of the company to plant a special seed on a certain acreage each year, and the seed derived from the cotton grown on that acreage is then sacked and stored separately for planting seed.

In 1937 the company set aside a total of 1,537 tons of planting seed.

In 1938 the company set aside a total of 1,007 tons of planting seed. (R. 3009).

(6) **Number of Men Employed.**

Peak Employment 1937-38	Peak Employment 1938-39
Week ending October 28, 1937, 189 employees, exclusive of office help.	Week ending October 27, 1938, 86 employees, exclusive of office help.

(R. 2998, 3000).

The evidence shows that the peak of employment each year is between October 15 and November 15, and that the number of men employed increases during the early part of the season and decreases during the later part of the season. (R. 2998, 3000).

Since practically all of the alleged discriminatory discharges occurred between November 14 and November 19, 1938, we will set forth herein the figures

showing a comparison of the work available at the Boswell plant about that time in 1937 and 1938.

The total amount of cotton ginned during the 1937-38 season to and including November 17, 1937, was 25,558 bales which was slightly more than one-half of the total amount of cotton ginned during that season. (R. 3006).

The total amount of cotton ginned during the 1938-39 season, to and including November 17, 1938, was 6,785 bales, which was over two-thirds of the total amount of cotton ginned during that entire season. (R. 3006).

On the day of November 17, 1937, a total of 468 bales of cotton was ginned. (R. 3005, 3006).

On the day of November 17, 1938, only 167 bales of cotton were ginned. (R. 3006).

Of the 1,007 tons of planting seed which was laid aside in 1938, 879.4 tons had been sacked, hauled and stored on November 17, 1938. (R. 3009). The picking of the acreage set aside for planting seed was completed on November 17, 1938. (R. 3010, 3011).

As is demonstrated by the foregoing figures, as well as by other uncontradicted evidence in this case, the season was fast drawing to a close at the time of the alleged discriminatory discharges.

The charge upon which the amended complaint here in question was issued was signed by E. F. Prior. Before April 20, 1934, Prior had been employed by Foster & Gamble Manufacturing Company at Long Beach, California, in charge of unloading and warehousing merchandise. (R. 1098). Subsequent to that

time he organized a number of local unions directly chartered by the A. F. of L., and known as Federal Unions. (R. 1095, 1096). He became business representative of each of these local unions. (R. 1096).

On **July 1, 1938,** Prior formed what was known as California State Council of Soap and Edible Oil Workers and was elected secretary of that organization. (R. 1093, 1094). The Council does not hold a charter from the American Federation of Labor but purports to act through representatives of each of the local unions organized by Prior. (R. 1094, 1095).

About **March 15, 1938,** Prior came to Corcoran with the president of his Bakersfield local, who was the brother of O. L. Farr, an employee at the Boswell plant. They called on O. L. Farr and discussed the organization of a union at the Boswell plant. (R. 815-818). While Prior was in Corcoran at that time he called at the office of the Boswell Company but neither the superintendent, Gordon Hammond, nor the manager, Louis T. Robinson, were there. (R. 818). The evidence shows that Gordon Hammond and Louis T. Robinson were the only persons at the Corcoran plant who had authority to hire or fire or speak for the company.

After that Prior made no further effort to organize the employees of the Boswell plant until **July 7, 1938,** at which time he again discussed the matter with O. L. Farr, who gave him a list of some 30 names of employees. (R. 818, 819). Prior decided to hold an organizational meeting on July 13, 1938 and invitations to the meeting were sent to the employees named on the list. (R. 819). On **July 13, 1938,** the meeting

was held in the American Legion Hall in Corcoran and Prior presided at the meeting. Only six or eight persons attended the meeting, including two men named Weatherby and Gilmore, neither of whom was employed at the Boswell plant at that time. (R. 819-821).

Prior testified that he first explained the purpose of the meeting and then told the men present that he would try to answer any questions that they might have relative to self organization. He was informed, particularly by Mr. Gonders, who was one of the Boswell Company employees, that the employees of the Boswell Company were one happy family, that they were very well satisfied with their wages, and that they really wanted no organization in the plant. (R.820-821).

After the meeting was over, Prior talked to Gilmore and Weatherby in one of the beer parlors in Corcoran, (R. 821), and Prior was permitted to testify, over the objection of respondents, to the remote hearsay that Gilmore informed him that some of the Boswell employees had not attended the meeting because the company was opposed to any organiaztion; that he (Gilmore) had not been reemployed at the plant when the mill started up on July 1, and that Gordon Hammond, the superintendent, had been very indefinite regarding any future employment with the Boswell Company. (R. 821-823).

Prior, without having discussed the matter either with the management or with any other persons, thereafter about **July 17, 1938,** filed an 8 (1) charge

against the Boswell Company with the regional office of the Board in Los Angeles. He testified that this was his next **organizational activity** (R. 823-824, 1110). He stated that although Corcoran is located in the Twentieth Region he filed the above mentioned charge in the Twenty-first Region at Los Angeles, with the consent of the Regional Director, because Prior's office was located at Wilmington, and it would be more convenient for him to have the matter handled by the Los Angeles office. He stated that he was later informed by the Regional Director of the Twenty-first Region that the charge must be filed in the Twentieth Region, as a result of which he withdrew the charge and filed the charge the next day in the Twentieth Region at San Francisco (R. 1173, 1174).

Since Prior's sole investigation in support of this sworn charge was his conversation with Gilmore and Weatherby, neither of whom was an employee at the time, it is apparent that this charge was based upon hearsay relating to an alleged discrimination against Gilmore. This charge was never served upon any of the respondents, and the Trial Examiner at the hearing refused to grant a request by respondents that the charge or a copy thereof, be produced for the purpose of testing the credibility of Prior and comparing it with the later charges which were filed by him. (R. 1102-1104; 1110, 1111).

Prior testified that in **August, 1938,** the Regional Director of the Twentieth Region sent Mr. Larson, one of the Board's investigators, to Corcoran for the purpose of investigating the charge; that Larson, after

completing his investigation on August 31, 1938, advised Prior that he felt there was not sufficient evidence to warrant the issuance of a complaint and requested Prior to withdraw the charge if nothing further happened within a couple of weeks. (R. 1174-1177).

Prior testified that on **September 2, 1938,** he met with Louis T. Robinson, Gordon Hammond and William W. Boswell at the office of respondent Boswell Company. Although the union had not been formed at that time, Prior informed them that the **"union"** had filed a charge with the Board, and that he would like to discuss it with them to avoid any possible misunderstanding as to the policies of the union. Louis T. Robinson testified that he told Prior at that meeting that the company had no objection to the men joining any union they saw fit, but that the company was faced with a serious unemployment situation, they knew that they would not have over a 10,000 bale cotton run and that he hoped Prior wouldn't do anything that would aggravate the condition. (R. 2841). This testimony by Louis T. Robinson was undisputed. Prior said his organizational operations would be on a high plane. During the course of this conversation, the name of Gilmore was mentioned by someone, and Louis Robinson stated that if he (Robinson) were going to try to organize a union he wouldn't try to build it around Gilmore but would go out in the plant and try to get some of the regular men. Mr. Robinson testified that he intended by this statement that if Prior was going to operate on a high plane he should

go right out and see the men, talk it over. (R. 828, 829; 2841-2844).

On **September** 2, 1938, Prior obtained the first Union membership applications from the Boswell employees (R. 1108, 1109). Farr (R. 1014; 1052), Martin (R. 1207), Spear (R. 1493; 1576), Wingo (R. 1616; 1632), and Andrade (R. 1702), signed applications for Union membership. Boyd Ely signed an application about September 5th, 1938. (R. 1752; 1762).

On **September** 27, 1938 the mill shut down. Quite a number of the men were laid off, including Martin, Farr, Andrade, Wingo and Boyd Ely.

On **October** 8, 1938, Prior as Union representative, called upon Gordon Hammond and discussed the re-employment of Andrade, Martin, Boyd Ely and Farr. Gordon Hammond told Prior that if Martin, Farr, Andrade and Boyd Ely **applied** for work they would be placed back to work as soon as work was available. Prior told Gordon Hammond that he would notify them to apply (R. 831-833; 3012, 3013). Within a few days after this meeting Martin, Farr, Andrade and Boyd Ely were re-employed (R. 833; 779; 801; 805; 781). Boyd Ely (R. 1746, 1747), and Martin (R. 1205) were given raises in pay when they were re-employed at this time.

About two weeks before or after this meeting Prior withdrew the charge filed by him on July 17 because, as he testified, "it appeared, or we felt that the alleged violation was no longer being practiced and that it was no longer necessary to go ahead and press the charge." (R. 1125, 1126).

Spear testified that about **October 5th or 10th, 1938,** he, Martin and Farr met with Gordon Hammond, the plant superintendent, as a Union committee and told him that they represented the Union. Spear testified that at that time, in his opinion, there were men being carried on the payroll that were not needed, and the purpose of this conference was to attempt to work out a schedule for the mill and gin or some method to keep the men from being laid off. Spear's version of this meeting was in substance as follows:

Gordon Hammond was willing to talk with them as a Union committee, he recognized them and was willing to work out some plans as to hours (R. 1527, 1528; 1532, 1533). Gordon Hammond showed him a letter from J. G. Boswell to the effect that the company would rather not start the mill at that time because it could keep the seed easier than the cotton-seed cake, but that if the mill started the company did not care whether the boys worked 8 or 12 hours. (R. 1528, 1529; 1565, 1566). Spear told Gordon Hammond that he had heard that some pressure was being put on some of the prospective Union members (R. 1520, 1521, 1526). Gordon Hammond told him that if anything like that was going on he didn't know about it and didn't authorize it (R. 1526, 1527). This alleged pressure was hearsay with Spear, and he didn't tell Gordon Hammond the names of any of the alleged offenders. Spear was not sure whether Gordon Hammond told him in this conference that the men were free to join any Union as far as the company was concerned, but Gordon Hammond had mentioned that

fact to him a month or so before this conference. (R. 1573, 1574). Spear testified that he thought Gordon Hammond had first mentioned this fact sometime in July, 1938, shortly after Prior first came to Corcoran. (R. 1575, 1576).

Spear testified that before this conference he and Martin and Farr had been soliciting Union members among Boswell employees. (R. 1578).

About **October 17, 1938** a letter (R. 1772; Boswell's Exhibit No. 8) was written by the manager to Gordon Hammond stating that there would be a crush of only around 5,000 or 6,000 tons of cottonseed that season. The letter stated that the company had no particular preference as to when the seed were crushed because it already had a large supply of cottonseed cake on hand, and that it would be easier to store the cotton seed than the by-products from it. The letter requested Gordon Hammond to have the employees designate their preference between a 12-hour shift and an 8-hour shift. This letter was passed around by Gordon Hammond and the employees who signed the list unanimously expressed their preference for a 12-hour shift. Among the employees who signed the list were Ygnacio Galvan, A. Galvan, Walter Winslow, Joe Briley, B. L. Ely, Lawrence Galvan, Pete Galvan and Manuel Escobedo, all of whom, the evidence shows, were members of Prior's Union or later became members. The oil mill was started October 24, 1938 and in accordance with this preference by the employees it ran on a 12-hour shift until November 15, 1938. (R. 3007).

Prior testified that on **November 5, 1938** a meeting was held of his Union, and the Union charter was installed. (R. 837-839). This charter had been applied for by Prior and was dated **October 26, 1938.** It contained the names of Farr, Wingo, Andrade, Martin, Spear, Peter Galvan and Emanuel Escobedo as charter members (R. 839-841). At this meeting Spear, Farr, and Martin were elected as president, vice-president and secretary respectively of the Union. (R. 854, 855).

Boyd Ely testified that he was working on the night shift at the mill and was laid off on the night of Novemer 14th. Walter Winslow testified that he was laid off on November 15, 1938, the day the mill closed.

Prior testified that he attended a meeting of the Union on **November 16, 1938** at which certain reported lay-offs and reported intimidations of prospective Union men were discussed (R. 858). A committee composed of Spear, Farr, Martin and Prior was selected to confer with the management concerning these reports. (R. 861, 862).

The evidence shows that Prior went to the Boswell plant after the plant was in operation on **November 17, 1938,** and that at his request Gordon Hammond called Farr, Spear and Martin **from their jobs** to hold a conference (R. 1053, 1054). Prior told Gordon Hammond that they knew a number of men had been laid off and that others would probably be laid off because of the smaller acreage and scarcity of cotton that year (R. 1156, 1157). Prior, Spear and Farr suggested

to Gordon Hammond that the working day be reduced to 8 hours so that everyone would get a little work rather than some of them being laid off (R. 1056; 1144; 1579, 1580). Prior called Gordon Hammond's attention to the fact some plants operated on a three-day week in order to avoid layoffs (R. 1144). Spear told Gordon Hammond that the Union was not asking for any increase in pay and that they were all familiar with the fact that there was a shorter cotton crop that year and familiar with the conditions (R. 863). They didn't discuss the reinstatement of the men who had been laid off (R. 1155). Spear told Gordon Hammond that a number of the employees had informed him (Spear) that Mr. Tommy Hammond and Mr. Joe Hammond had been telling the men that they would lose their jobs if they joined the Union, or that the Company would shut down and had been making a number of intimidating remarks (R. 1157). They discussed the authority of Tom Hammond and Joe Hammond and Prior stated that he wanted "a clarification by **someone in charge** as to their exact status" (R. 1158, 1159). Gordon Hammond informed them that neither Tom Hammond nor Joe Hammond had authority to hire or fire employees, that no one had such authority other than himself. He also informed them that Tom Hammond and Joe Hammond were not authorized to make those statements, and that he would talk to them about it (R. 1159).

Gordon Hammond testified as follows: Prior asked him if the men would be laid off if they came to Union meetings and he replied that they would not

and that Prior could tell them if they wanted to go it was all right for them to go, and if they would rather ask him, Gordon Hommand, he would tell them to do so, or they could ask Louis Robinson (R. 3015). Spear said that he had heard Tom Hammond and Joe Hammond were telling some of the employees that if they joined a union they would be laid off, and Gordon Hammond told him that he didn't think they were saying that because he had instructed them previous to that time not to say anything about the Union, and that any of them had the right to join the Union, or any union (R. 3017). Prior asked him not to lay off Union men and Hammond told him he did not know who the Union men were and that earlier that morning he had already told three men (referring to Griffin, Johnston and Eller) that there would be no work for them after that day as the sacking of planting seed would be completed. (R. 3016). Spear then offered to furnish Gordon Hammond with a list of the names of the Union men, but Prior told Spear not to do this as it was against the Union rules (R. 3016).

Gordon Hammond also told the committee at that time that he was planning on closing down gin No. 4 that day and they asked if there was some way this gin could be operated longer. He told them he would see if he couldn't work out some plan to do so (R. 1579; 3017). The testimony of Gordon Hammond relating to this conversation was not denied and was substantially corroborated by the testimony of Spear who confirmed the fact that Hammond told them no one was authorized to make statements against the Union.

Prior testified that at the time of this conference the committee knew the company was then laying off certain men and was about to close down one or more of the gins and it looked as though the work was about to run out if they continued working the customary number of hours (R. 1141). Spear testified that he knew the work was running out about that time (R. 1567).

Gordon Hammond testified that later during the same day, to wit, November 17, 1938, he spoke to Tom Hammond and Joe Hammond concerning the alleged intimidating remarks (R. 3019) and that previously in September, 1938, he had instructed them not to interfere with any of the men joining a union as they had a right to join any union. (R. 3017, 3018). This testimony was neither contradicted nor impeached in any way.

Following this conference, gin No. 4 was not shut down as originally contemplated but Gordon Hammond issued instructions for two of the gins to start on the following morning, November 18, 1938 at 7 a. m. and to run until 3 p. m., and for the other two gins to start operations at 10 a. m. Before this time it had been the practice to start all of the gins at 7 a. m., and Gordon Hammond's purpose in reducing the operating time was to provide employment as long as possible (R. 3019). Spear testified to this change in hours and stated that he understood that this change was part of the plan which had been suggested to Gordon Hammond by the Union at the meeting of

November 17, 1938 (R. 1583).

On the morning of **November 18, 1938**, the members of Prior's Union wore their Union buttons to work at the plant for the first time. (R. 1494). Gordon Hammond left the plant for Los Angeles that morning about 8:30 and did not return to the plant until about 7 o'clock that evening (R. 3020, 3021). About 10 o'clock that morning during his absence some of the employees at the plant shut down some of the machinery, and the employees then held a meeting in the yard near the warehouse (R. 1498, 1499). The testimony regarding the occurrences at that meeting consisted mainly of conversations which were hearsay as to all respondents and were admitted in evidence over the objection of all respondents. According to Spear, some of the men asked him about the Union, and he started to explain about the 8-hour plan that was being put into effect to save gin No. 4 from being closed. (R. 1503). Someone suggested that they throw the Union men out (R. 1214, 1215), and three men took hold of Spear and led him over to the company's office (R. 1504) where some of the men in the crowd demanded to see Louis Robinson. Louis Robinson came to the door of his office and some of the men requested him to fire the Union men (R. 2618). When Louis Robinson found out about the trouble he told all of the men who were present that they were too excited and he wanted them to go back to work, both Union and non-union, and after they cooled down he would come out and see if he couldn't straighten the matter out (R. 2619). All of the men then return-

ed to their work. (R. 1506). However, the non-union men refused to work with the Union men (R. 1513) and, after waiting a few minutes for Louis Robinson to come around, Spear and the other Union men discussed the matter and left the plant. None of them notified Louis Robinson of their intention to leave, and the first knowledge he had concerning their departure was when Farr telephoned him between 11 and 11:30 A. M. that morning and informed him that the Union men had decided it was best for them to go home. (R. 1013; 1241, 1242; 1517, 1518; 2620; 2624).

Neither Louis Robinson nor Gordon Hammond had any notice or knowledge that the employees intended to hold a meeting on the morning of November 18th (R. 2849; 3021), and the employees had not been given permission or authorized to shut down the plant or leave their work. The first knowledge Gordon Hammond had of the occurrences on that morning was when he returned to the plant from Los Angeles that night (R. 3021). When he returned to the plant that evening he went into his office and started making up the time cards. After he had made out about half of the time cards he was called out to the scale house to weigh some cotton. Before leaving his office to weigh the cotton he talked with E. M. Roberson and Rube Lloyd who happened to be present. (R. 3135). He asked them what the crowd was doing in the front office, and they told him there had been some difficulty among the employees that day out in the yard and the men had come there that evening for the purpose of letting the Company know they were

satisfied with the work, the way it was managed, and conditions in every way. (R. 3135, 3136). They told him what had taken place that morning, and that there seemed to be some misunderstanding among the employees that morning (R. 3136). They also told him about Spear having been taken to the office and about Mr. Louis T. Robinson telling all of the men to return to work, but that later some of the Union men had left. Mr. Hammond told Lloyd and Roberson that was the worst thing they could have done; that they shouldn't have done that (R. 3140).

On the evening of **November 18, 1938** a number of the employees met in the lobby of the administration building. The facts concerning this meeting are hereinafter set forth and discussed in connection with the Association.

On **November 19, 1938,** Prior, Martin and Spear called at the company's office and met with Louis Robinson and Gordon Hammond (R. 869). Prior asked about putting the Union men who had left the plant on the day before back to work (R. 870; 2850, 2851). Louis Robinson testified that he said the men could go back at any time, but Prior said they would need special protection. According to Louis Robinson, he told them he didn't think they needed **special** protection and the company wouldn't furnish it, but they could go back to work, and he suggested that the Union men go and talk to the other employees and everything would be all right. The Union men, however, said they didn't want to talk with the other employees, and Louis Robinson told Gordon Hammond

to feel out the men to see if protection was necessary (R. 2850, 2851). Louis Robinson also said he told them that the men could go back to work but if they didn't go back to work they would get their pay anyway until some determination of the matter. Prior asked for the earliest possible answer and Louis Robinson said he couldn't hurry but he would let them know as soon as he could (R. 2851).

Prior testified that he suggested to Louis Robinson that it would be better to let the Union men stack and re-stack cake in order to prevent more serious consequences (R. 1122, 1123). He stated that the more serious consequences to which he referred were a Board hearing and a boycott (R. 1124, 1125). According to Prior, Louis Robinson stated that there was a tense feeling among the employees still working which required careful consideration before bringing the Union men back and causing another flare-up (R. 1136, 1137) and that he and Gordon Hammond would feel out the sentiment of the men (R. 1138, 1139). Prior also testified that he told Robinson he would like to know by 12 o'clock (R. 871).

Spear testified that there was some talk in this conference about the company furnishing protection, and he admitted that Louis Robinson might have said that the men could go back to work right away but no extra protection would be given (R. 1557).

Prior testified that when he heard nothing from Louis Robinson by 12 o'clock that day, the Union voted a boycott against the products of the Boswell Com-

pany (R. 871).

On November 21, 1938, Prior filed charges against the Boswell Company with the Board in Los Angeles (R. 695, 696; Board's Exhibit 1 (b)).

Within a few days after the filing of these charges, Mr. Larson, a representative of the Board, called and spent at least two days in Corcoran investigating the charges (R. 2636, 2637). The exact date of Mr. Larson's call does not appear from the record, but it was some time between November 21, 1938 and November 25, 1938, as Prior testified that he discussed with Mr. J. G. Boswell in Los Angeles on November 25, 1938 the matter of the notice hereinafter referred to which was posted at the plant at the request of Mr. Larson (R. 1182), which fact was verified by the letter written by the Los Angeles office of the Company to its Corcoran office on November 25, 1938 (R. 2607; Board's Exhibit No. 26).

While Mr. Larson was there he presented a form of notice to the employees, prepared by him, which he requested the Company to post on its bulletin board for fifteen days (R. 2635, 2636). With the approval of Mr. Larson certain changes were made in the wording of the original draft of the notice, and the final draft of the notice (R. 2641; Boswell's Exhibit No. 12) was posted on the same day on the bulletin board and was posted for in excess of fifteen days (R. 2643, 2644). That notice read as follows:

"NOTICE TO EMPLOYEES

This company will not through its proper representatives or otherwise, restrain, coerce,

intimidate or interfere with our employees right to self organization as guaranteed by the National Labor Relations Act.

Furthermore this company will not discriminate with regard to hire or tenure of employment because of affiliations with the American Federation of Labor or any other bona fide labor organization.

This notice will be posted for a period of Fifteen Days."

The posting of this notice satisfied Mr. Larson (R. 2902).

On **November 25, 1938,** Prior conferred with Mr. J. G. Boswell, president of respondent Boswell Company, in Los Angeles. Another member of the firm was also present. Prior testified that he told Mr. Boswell he would like to have a complete understanding of all the issues, and have the matter settled (R. 871, 872; 1194-1196). According to Prior, Mr. Boswell stated that the local management was competent to handle the matter and it was in their hands (R. 872). Upon cross-examination Prior at first testified that during the course of his conversation with Mr. Boswell in Los Angeles the latter stated that the notice which had been prepared by, and posted in the plant at Corcoran at the request of, Mr. Larson stated the policy of the Company (R. 1182); however, later in his cross-examination Prior testified that Mr. Boswell could have made this statement; that he was not positive whether he did or not (R. 1197). Prior also admitted on cross-examination that the charge filed by him against the Boswell Company with the Board on November 21, 1938 was also read over by and discussed

with Mr. Boswell during the above mentioned conference, and that the Larson notice was also discussed at this conference (R. 1194, 1195).

Prior in his testimony was rather vague as to the details of his above mentioned conference with Mr. J. G. Boswell. However, the Board itself introduced in evidence a letter dated November 25, 1938, which was written by Fred G. Sherrill, who was present at the conference between Prior and Mr. Boswell, to J. G. Boswell Company at Corcoran (R. 2607; Board's Exhibit No. 26). This letter was written the same day of the conference while the entire matter was fresh in mind and fully and accurately sets forth the discussion which was had at said conference. Said letter reads as follows:

"J. G. BOSWELL COMPANY
Cotton Merchants and Manufacturers
of Cottonseed Products
354 South Spring Street
Los Angeles, California
November 25, 1938.

J. G. Boswell Company
Corcoran
California
Attention of Mr. L. T. Robinson
Mr. G. L. Hammond

Gentlemen:

LABOR MATTERS

Mr. Prior, Secretary and Treasurer of the California State Council of Soap and Edible Oil Workers, called on Colonel Boswell this afternoon.

Colonel Boswell told Prior that the notice to employees, now posted on the bulletin board at Corcoran, covered his position and that of the company. He also told Prior that those employees who had been put off the

property, as outlined in your letter of November 18, would (provided there was work for them) be paid during the period of their absence in accordance with the policy of the company under the National Labor Relations Act, as outlined in the notice.

Colonel Boswell also told Prior that the responsible individuals in the management of the Corcoran plant were Mr. L. T. Robinson and Mr. Gordon L. Hammond, and that while in the conduct of the business and the running of the plant certain authority might be delegated as between these two individuals and others on the company's payroll, that he, Colonel Boswell, was not acquainted with the detail in this respect.

Prior stated that he had a better understanding of the company's business following his talk with Colonel Boswell, at which point he was told that the published notice constituted all there was to the company's position, and anything which Prior may have inferred from the conversation which went beyond this notice was not in keeping with the position of the company, that we felt the notice was clearly in keeping with the National Labor Relations Act, and it was the intention of the company to conduct its affairs strictly in accordance with the law.

Yours very truly,

FRED G. SHERRILL,
Treasurer"

Gordon Hammond testified that on the afternoon of about **November 26, 1938,** or a little later, he had a conference with Prior, Spear and Martin, at which time Prior wanted to know about putting the men who had left on November 18th back to work. Gordon Hammond told them that they would take any of the men, or all of them, back when they had work for them beginning the next morning or any time they wanted to come back. (R. 3024). They asked to see Louis

Robinson but Mr. Robinson was not at the plant that afternoon. This testimony of Gordon Hammond's is uncontradicted.

Prior testified that he had another conference with Gordon Hammond about **November 27, 1938,** at which time Gordon Hammond stated that he was sorry the whole thing had happened and that it wouldn't have happened if he had been there (R. 873). Gordon Hammond also testified to this conference with Prior and stated that Prior asked him if the Company would take all of the men "back in a body." Gordon Hammond testified that he told Prior that they didn't have work for all of them to take them all back in a body (R. 3025). According to Gordon Hammond, Prior asked him if the Company couldn't take them back and put them in the warehouse tearing down stacks of cake and re-stacking them for two or three days and Gordon Hammond said he couldn't do that. Prior then stated that if the Company wouldn't take the men back he would make the Company take them back as he had been up against propositions like that before. Prior threatened to tie up all the cotton, oil and cake in the Boswell Company, calling attention to other plants where they had tied up as much as a million dollars worth of property; that they would tie it up to where it couldn't move. Prior then asked Mr. Hammond to arrange an appointment for him with Louis Robinson for the following day, which Mr. Hammond did (R. 3025, 3026). This testimony of Gordon Hammond was not contradicted.

Prior testified that on **November** 28, 1938, he and

Martin had a conference with Louis Robinson. Prior's testimony on this matter was as follows: He told Mr. Robinson that he and Martin wanted to discuss the matter of these men being replaced on the payroll, that they felt they had been discriminated against and "if someone in authority stated that there was to be no arguments on the job that as far as the other employees were concerned that there would be no opposition." (R. 874). Mr. Robinson wanted to know who the men were that Prior referred to that should be placed back on the payroll and Prior started to name the men. Prior named Spear, and according to Prior, Robinson said that as there was work from time to time that they could use Spear on, that there had been times since November 18 that he would have worked a few days. Prior then named Martin and Prior stated that Mr. Robinson laid his pencil on the desk and said,

> "Well, Mr. Martin's machine is just shut down and we can not use Mr. Martin. We might at some time in the future, but we don't have any idea when."

Prior then testified that he stated,

> "I told Mr. Robinson if that was the attitude in regard to Mr. Martin, that we could not have some understanding as to him, as well as all the rest of them, there was no need of naming any further, and the conference ended" (R. 875).

Upon cross-examination Prior, when asked concerning this matter, testified as follows: Mr. Robinson asked him just who he had reference to in regard to the re-employment of the union members. Prior said

he would name them and he named Spear, and Mr. Robinson said,

> "Well there has been some work we could have used Mr. Spear on since he has been off, and we can use him from time to time as there is work for him,"

and Mr. Robinson wrote Spear's name on a pad (R. 1183). Prior then called the name of Martin and Mr. Robinson laid his pencil down and said,

> "Now there is no work. The operation that Mr. Martin was on has definitely shut down, and there is no work for Mr. Martin" (R. 1183);

that they might at some time later use him but that it was indefinite (R. 1184). Prior then stated,

> "Well, Mr. Robinson, unless all of these employees are going to be given consideration—they have all been given the same treatment. They are all evicted—and unless all of these employees are going to be given the same consideration, there is no need of discussing the matter further. We are wasting your time, and we are wasting ours."

This ended the conference according to Prior's testimony (R. 1185).

Prior also testified regarding the above conference as follows:

> "Q. Well, the fact is, isn't it, Mr. Prior, that when you were told by Mr. Robinson that Martin's particular job had become exhausted or that that operation had given out, you then told Mr. Robinson that if Martin wasn't taken back, then nobody would come back to work?

A. It is possible that I made that statement.

Q. Isn't that the substance of what you did say?

A. I wouldn't say that was the substance. It is possible I made that statement." (R. 1189).

Louis Robinson testified as follows regarding the above discussion:

"The first man he named was Lonnie Spear. I wrote his name down and told him that we might find some work for Lonnie, that his gin would probably run a few more days.

I don't know if Martin was the next man he named, but if he named anybody betweeen Spear and Martin, I don't remember it.

Then he named R. K. Martin. I told him that Mr. Martin's gin had closed down and we didn't have any work for him at that time.

He said, 'Well, if you don't have any work for Martin, there is no use to talk any further.'

Q. What happened, if anything?

A. He walked out." (R. 2856).

Even though the undisputed evidence shows that Louis Robinson offered to re-employ Spear during the conference of November 28, Prior testified that Spear never applied for work again to his knowledge (R. 1192). Spear testified that Prior didn't inform him about this offer to re-employ him and he heard nothing about it until he heard Prior's testimony at the hearing (R. 1552). The evidence showed that Martin had been working on gin No. 4, which gin closed on

November 25 (R. 3005), and that the other gins were about to close.

The evidence further shows that all of Prior's Union men who left the plant on November 18, 1938 were kept on the payroll and were paid to the end of the time that the respective jobs on which they had been engaged were completed in the normal course of operations. Prior knew this fact and had made photostatic copies of some of the checks received by some of his men (R. 1199). The evidence also shows, without contradiction or dispute, that the operations on which these men had been engaged were completed without the employment of any new or additional men at the plant (Board's Exhibit No. 3).

The Board in an effort to establish that the Boswell Company had replaced with new employees the Union men who left the plant on November 18 introduced in evidence the social security records of a number of other employees of the Company who worked for the Company at various times subsequent to November 18 and prior to the date of the hearing. The employees so named and the undisputed evidence with respect to them were as follows:

> **Douglas Caffell** who was first employed by the Boswell company in September, 1938, was a cowboy who worked at the Reden Ranch, which was leased and operated by the company as a cattle ranch. He worked regularly as a cowboy and had never worked at the company's Corcoran plant (R. 3105, 3106; 3205). His salary, as shown by

Board's Exhibit No. 3, was a monthly salary of $75.00 per month.

Al Chestnut never worked at the Boswell plant at any time and he was not an employee of the Boswell Company. He was an employee of Peterson Farms Company. In the latter part of the year 1938 the Boswell Company contracted to pump the water off the land in Lovelace Reclamation District in which Peterson Farms Company is located. According to the terms of this contract the reclamation district was to furnish the men to supervise the operation of the pumps and Al Chestnut was one of the men furnished by the district. However, the district did not have any workmen's compensation insurance, so Al Chestnut was carried on the Boswell Company's payroll to keep him covered by compensation insurance and settlement was made therefor upon the completion of the contract (R. 2896, 2897).

Lee Chestnut was also carried on the company's payroll at the same time and under the same circumstances as Al Chestnut and he likewise was never employed by the Boswell Company and never worked at the Corcoran plant (R. 2898).

Ygnacio Galvan—The evidence shows that he had worked at the plant for about ten or eleven years prior to November 18, 1938 (R. 3109, 3110). Furthermore, the evidence shows that sometime after September 2, 1938 he was solicited by Andrade and signed up for the Union (R. 1720, 1721).

He continued to work after November 18, 1938 when work was available. (R. 792, 793).

Peter Galvan—The evidence shows that he worked for the company for a period of six or seven years before November 18, 1938 (R. 3100). The evidence also shows that he was one of the charter members of Prior's union (R. 840; Board's Exhibit No. 4). He continued working after November 18, 1938, when work was available. (R. 796).

Lawrence Galvan—The evidence shows that he had been employed by the Boswell Company for a period of five or six years prior to November 18, 1938 (R. 3100). The evidence also shows that he signed up for membership in Prior's union (R. 1722). He continued working after November 18, 1938, when work was available. (R. 789).

V. C. Galvan—The evidence shows that he had worked for the Boswell Company for a period of about two years prior to November 18, 1938 (R. 3100, 3101). He also worked after November 18, 1938, when work was available (R. 795).

M. S. Escobedo—The evidence shows that he had been employed by the Boswell Company for three or four years prior to November 18, 1938 (R. 3101). He was one of the charter members of Prior's union (R. 840; Board's Exhibit No. 4), and continued to work after November 18, 1938, when work was available. (R. 794).

H. M. Smith—The evidence shows that he

had previously been employed, commencing in September, 1937 (R. 3086; 3101, 3102).

Joseph Melton—The evidence shows he had also worked for the company prior to November 18, 1938, and since October 1, 1938 (R. 783; 3103).

Fred Mathews—The evidence shows he had likewise been employed by the company prior to November 18, 1938, and since May 13, 1938 (R. 780; 3104).

Waldon Bunker—The evidence shows that he was what is known as a "pick-up cowpuncher or cowboy," that he was also employed from time to time, as his services were needed, as a cowboy at the Wreden Ranch, and that he never worked at the Boswell Company's plant at Corcoran (R. 3104, 3105; 3205, 3206).

H. A. Champane—The evidence shows that he was a welder who was employed in the blacksmith shop in March, 1939 (R. 3106); that his work was of a specialized nature and that none of the complaining union employees was capable of performing it (R. 3110).

Charles A. Crye—The evidence shows that he never worked at the Corcoran plant but worked for the Malga Company on the Chamberlin Ranch, which ranch is owned by the Boswell Company and is located a number of miles from Corcoran (R. 799, 3106-3108).

John Watson—The evidence shows he was never employed at the Corcoran plant but worked

on the Chamberlin Ranch (R. 788; 3107, 3108).

Harry Rickman—The evidence shows he was never employed at the Corcoran plant subsequent to November 18, 1938, but since about March 11, 1939 he was employed to drive a bulldozer on the levee in Reclamation District No. 749, which is situated in the Tulare Lake area some distance from Corcoran. (R. 3109).

Vernon M. Rood—The evidence shows that he was first employed by the Boswell Company in August of 1935 (R. 3081; 3083).

There was no evidence or showing whatsoever that any of the Union men who left the plant on November 18 were in anywise qualified to do the type of work which was performed by the employees whose names are hereinabove set forth.

On **November 28, 1938** Andrade, L. E. Ely, E. C. Powell and R. K. Martin were each advised by letter that their employment had terminated because the jobs on which they were employed had been completed (R. 2858; 2862; 2864; 2966).

On **December 6, 1938** Wingo, Spear and Farr were each advised by letter that their employment was terminated because the jobs on which they were employed had then been completed (R. 2868; 2870; 2872).

The only reason for notifying them by letter was that they were in the favorable position of receiving pay without working and they were not at the plant to be notified in person (R. 2934).

Joe Briley, one of the Union men in question, ap-

plied for work shortly after November 18th and was re-employed. He has worked from time to time as work is available since that time. Also, the following men shown by the record to be members of the Union have been employed from time to time since November 18th as work was available: Ygnacio Galvan, Peter Galvan, Lawrence Galvan and M. S. Escobedo.

The evidence is undisputed that none of the men mentioned in the Amended Complaint applied for work since November 18, 1938; that no offer was made by any of them to accept employment, except through Prior, who made the conditional offer that they must all be re-employed, or none of them would return.

On **January 17, 1939**, a meeting was held at the Company's office between Prior, Spear, Farr, Martin, Andrade, Johnston, and Winslow, representing the Federal, and Mr. Louis Robinson and Mr. William Boswell, representing the Boswell Company. In addition thereto, there were present at the meeting Mr. Maurice Howard, a field examiner of the National Labor Relations Board, 21st Region, and Mr. Bill Robinson and Mr. Kelley Hammond, who were employees of the Boswell Company (R. 875, 876, 2875).

Louis Robinson testified that Mr. Howard was carrying on an investigation in the plant and on January 17, 1939 was discussing it with him. Howard contended that after Louis Robinson had told the union men to go back to work on November 18 that they were bodily ejected from the job. Louis Robinson denied this and Howard offered to prove that he was correct. Howard left the office and returned with some of the

men allegedly evicted and questioned them. The men replied that they left the plant because they had gotten together and talked it over and decided that was the best thing to do. Mr. Robinson asked them, particularly Spear, if any one had hurt them or cursed them or ordered them off the property and Spear and the other men said none of those things had occurred. Howard then asked the men if they were afraid that something might happen and some of them said they were. Howard stated to Louis Robinson that the men left the property because they feared violence and that it was the same thing as being bodily ejected. Louis Robinson testified that Spear then described the incidents of November 18th before the men came to the office. After that Howard said if they had done that to him he would have shot all three of the men and that Lonnie Spear would have been fully justified in shooting all three (R. 2876, 2877).

Mr. Robinson also testified that during the course of the meeting with Prior, Howard, and the others on January 17, 1939, he stated, in effect, that no foreman or any one else was authorized by the Company to make any statement regarding any employee's membership or non-membership in any union, and that no employee's position would be affected because of membership in any union (R. 2887); that he made this statement because Mr. Howard discussed the matter with him and he explained the Company's position (R. 2888). Mr. Robinson also testified that he had made substantially the same statement to Mr. Prior during the course of the conversation which took place about

September 1, 1938, and also in the conversation which took place on the morning of November 19, 1938. (R. 2889).

Mr. Prior's version of this meeting was as follows: He testified the union representatives stated that on November 18, Bill Robinson and Kelley Hammond had shut down some of the machinery in the gins at the time of the eviction of the union employees (R. 876). Bill Robinson and Kelley Hammond admitted they did shut down some of the machinery. Mr. Louis T. Robinson stated that neither Mr. Bill Robinson nor Mr. Kelley Hammond were authorized to cut the power off the machinery, and that no one had been authorized on behalf of the Company to interfere with the operations of the plant. Prior testified that was all that he recalled regarding what was said at the conference. (R. 876, 877).

Mr. Robinson testified that on the morning of January 18, 1939, Mr. Howard again returned to the office, and they had a further conversation. No one else was present. (R. 2886). In this second conversation with Mr. Howard the latter stated that he wanted the Company to discharge all the non-union employees who had taken part in the events of around 10:00 o'clock of the morning of November 18, and wanted the Company to hire union men in their places, and wanted the Employees' Association dissolved. Mr. Robinson told him there was no labor dispute between the management and its employees; that any dispute that existed was between two groups of employees; that the Company was not going to fire anybody that

was giving satisfactory service on the job; and that the company had nothing to do with the organization of the Employees' Association and would make no efforts or attempts of any kind to dissolve it. Mr. Howard then stated that if Mr. Robinson did not do that, he would call the Labor Board hearing and Mr. Robinson would get a lot worse. Mr. Howard took a little pamphlet out of his pocket that had a number of decisions in it and pointed out some of the decisions that had been found at labor board hearings. Mr. Robinson told Mr. Howard that he thought none of those cases were similar to the Company's position and he would stand just where he told him (R. 2889, 2890). Mr. Howard then said "All right." "Then you will get the board hearing." (R. 2890).

Mr. Robinson's testimony with respect to the foregoing conversations with Mr. Howard were not denied, and his version of said meetings, particularly that of January 17, 1939, is substantiated by the testimony of Walter Winslow (R. 1687), George Andrade (R. 1898-1903, and L. A. Spear (R. 1589, 1590), all of whom attended said meeting and testified with respect thereto.

On **January** 18, 1939, Prior again called at the Boswell Company's office and conferred with Louis Robinson. He stated that Mr. Maurice Howard had suggested the conference (R. 878). This was the last time Prior conferred with any representatives of Boswell Company (R. 878).

Regarding his conference with Prior on **January** 18, 1939, Louis Robinson testified that Prior called on

the afternoon of that day and said he was calling on Robinson at the suggestion of Mr. Howard and he wanted to know if there had been any change in the company's position after Mr. Howard's visit. Robinson stated that he told Prior, "No, Mr. Howard's visit had not changed the company's position at all" and that that was all of the conversation. (R. 2891, 2892).

Mr. Robinson's testimony with respect to the two conferences held with Mr. Howard on January 17th and 18th, 1939, respectively, in which he outlined the Boswell Company's labor policy, is also substantiated by the fact that on January 20, 1939, Prior personally inserted a notice in a newspaper published in Corcoran, California, known as the Corcoran News (R. 970; 1129, 1130), which said notice read as follows:

"ATTENTION

J. G. BOSWELL CO. EMPLOYEES

"Many employees of the J. G. Boswell Company have stated that foremen of the company have told them that membership in the American Federation of Labor would affect their employment with the company.

"Mr. Louis Robinson, general manager of the Corcoran plant, stated in the presence of the following men who attended a meeting in his office January 17, 1939;

"Maurice Howard, Field Examiner of the National Labor Relations Board

Wm. Boswell, of the company.

E. F. Prior, Sec.-Treas., California State Council of Soap and Edible Oil Workers

Wm. Robinson, Employee of company

Kelly Hammond, employee of company

L. A. Spear

O. L. Farr
R. K. Martin
W. R. Johnston
Elgin Ely
George Andrade
Walter Winslow
Officers and members of the Cotton Products and Grain Mill Workers Union No. 21798:

"NO FOREMAN OR ANYONE ELSE IS AUTHORIZED TO MAKE ANY STATEMENT REGARDING ANY EMPLOYEE'S MEMBERSHIP OR NON-MEMBERSHIP IN ANY UNION BY THE COMPANY AND THAT NO EMPLOYEE'S POSITION WOULD BE AFFECTED BECAUSE OF MEMBERSHIP IN ANY UNION."

After the declaration of company policy by Mr. Robinson, no employee of the company should be afraid to attend a meeting for the purpose of learning the history and gains made by organization in their industry—they really owe it to themselves to learn everything possible about these new developments.

A MEETING WILL BE HELD IN THE CORCORAN AMERICAN LEGION HALL
January 23, 1939, at 8:00 P. M.
for the purpose of discussing labor problems with the employees of this industry.
COTTON PRODUCTS & GRAIN MILL WORKERS UNION No. 21798
R. K. MARTIN, Secretary.
CALIFORNIA STATE COUNCIL OF SOAP AND EDIBLE OIL WORKERS
E. F. PRIOR, Secty.-Treas."

The evidence shows without dispute that the conference which Prior had with Louis T. Robinson on January 18, 1939, was prompted by and was the direct result of the conference above mentioned which had

taken place between Mr. Robinson, Mr. Prior, Mr. Howard, and others on January 17, 1939, and the one between Mr. Robinson and Mr. Howard on the morning of January 18, 1939.

The only complaining Federal member who was questioned regarding the above mentioned notice by Prior was Johnston. He testified he saw the notice in the paper, and that he never heard anything which led him to any other opinion regarding the policy of the Boswell Company than the statement contained in said article. (R. 972).

Prior testified that in the evening of **January 21, 1939,** a meeting of union members was held in his hotel room in Corcoran and the matter of picketing the Boswell plant was discussed. That in addition to Prior there were present at this meeting Spear, Powell, Johnston, Martin, Wingo, and Andrade (R. 883). Prior testified that at this meeting he explained the reasons why picketing had not been previously instituted, but testified:

> "We felt that it would be necessary to place the pickets down there and make the boycott still more effective. And the members of the organization present voted to take that action." (R. 884).

The evidence shows that the institution of picketing was voted by only six members of the Union. There was no evidence whatever to show that the meeting at which this vote was taken was a regularly called meeting.

On cross examination, Prior was asked to state what, if any, requirement is contained in the constitution and by-laws of the American Federation of

Labor, so far as a quorum of union membership necessary to authorize picketing is concerned, and replied that this is a matter which is left strictly to the local automony of all local unions. He was then asked whether, in the case of this particular Local, any rule or custom had been adopted with respect to the number of members necessary to constitute a quorum to authorize picketing. Prior stated there had been no definite rule set up with regard to that matter by the Local pertaining to picketing; that those matters are just taken care of the same as any other routine business of the organization. That the only rule they have in any local union is the rule pertaining to the calling of a strike. (R. 1132-1135).

The evidence shows very clearly that the vote on picketing was taken at merely an informal meeting of only a few of the Federal members.

Picketing was thereafter instituted on or about January 23, 1939. (R. 883), for the purpose, as Prior testified, of making the boycott still more effective. (R. 884). Picketing consisted of placing two men in an automobile on the side of the public highway near the Boswell Company's plant, and a sign reading "A. F. of L. picket car" was placed on the car and according to Prior's testimony as trucks came in with merchandise or came to receive merchandise the picket stepped out of the car and explained the controversy between the Union and the Company and requested their co-operation. (R. 885, 886).

Among the members of the Federal who participated in these picketing activities were Andrade, Wins-

low (R. 886), Griffin and Elgin Ely. (R. 1869).

On **January 30, 1939,** a group of farmers and others who were apparently incensed because of the picketing gathered around the picket car and dispersed the pickets. Thereafter on **February 6, 1939,** Prior filed his second amended charge against respondent Boswell Company, and also included therein a charge against Associated Farmers of Kings County, Inc., alleging that both Boswell Company and Associated Farmers were responsible for the gathering of the group of men which dispersed the pickets. However, this charge was never served upon any of the respondents and the Board in its Decision and Order found that neither Boswell Company nor Associated Farmers were responsible for the dispersal of the pickets.

On **March 2, 1939,** Mr. C. H. Glenn, who was the President, Manager and Principal Stockholder of respondent Exchange, discharged Margaret A. Dunn.

On **March 4, 1939,** Prior filed his third amended charge and the acting Director of the Twenty-first Region issued a complaint on said date against respondents Boswell Company and Associated Farmers. After the matter had been set for hearing, on March 13, 1939, and the complaint had been served the Board indefinitely continued the hearing without assigning any reason therefor.

On **March 14, 1939,** Mrs. Dunn filed a charge with the office of the Twenty-first Region of the Board against the Corcoran Telephone Exchange. This charge was signed by her personally; however, the

charge was never served on any of the respondents.

On **April 14, 1939,** Mrs. Dunn wrote the office of the Board in San Francisco requesting that her charge be dropped. (R. 2525; Board's Exhibit No. 23).

On **May 4, 1939,** Prior signed and filed his fourth amended charge against all three of the respondents and an amended complaint was issued and served and the case went to hearing before trial examiner on **May 18, 1939.**

The case against the Exchange is separately discussed hereafter and is mentioned in the foregoing recital of facts merely for the purpose of showing the sequence of events.

B. THE ALLEGED INTIMIDATION, RESTRAINT AND COERCION.

The alleged intimidation, restraint and coercion alleged to have been practiced by the Boswell Company consisted solely of statements in opposition to the Federal alleged to have been made by various employees of the Boswell Company. The Board in its purported Decision and Order, and counsel for the Board in their brief, laid much emphasis upon that testimony, all of which was hearsay and was admitted over respondents' objections.

The evidence discloses that none of these alleged statements was made by anyone in a responsible position who had authority to bind the Company and that if such statements were made, they were completely unauthorized and can not be binding upon respondent.

In considering this question it should be borne in mind that the evidence fails to show any antagonism or hostility whatsoever by any of the officials of the Company toward the Federal. On the contrary, the evidence shows by the testimony of the Board's witnesses, as well as the witnesses called by respondents, that the Boswell Company gave the Federal and its officers, members, and representatives every consideration; that Louis Robinson and Gordon Hammond met with the Federal's representatives on every occasion that they requested conferences; that they adopted suggestions offered by the Federal's representatives regarding the operation of the oil mill gins, and that they re-employed and in some instances raised the wages of Federal members after the employment of such men had been discussed with the management by Federal representatives. These admitted facts show beyond question that the Boswell Company was not hostile to the Federal.

The Board repeatedly in its purported Decision and Order, and counsel for the Board in their brief, makes reference to alleged anti-union statements by so-called supervisory employees. However, an analysis of the evidence discloses that there were no "supervisory employees" at the Corcoran plant other than Louis T. Robinson and Gordon Hammond.

The evidence clearly shows without contradiction that Louis Robinson was general manager for San Joaquin Valley of the Boswell Company (R. 2578, 2836, 2837); that Gordon Hammond was the plant superintendent of the Corcoran plant (R. 2837); that the au-

thority of Gordon Hammond and Louis Robinson was limited by the head office but that they were the only persons in Corcoran who were authorized to speak for the Boswell Company concerning its business, or to bind the company (R. 2838). Gordon Hammond was in charge of the manufacturing end of the plant and Louis Robinson was in charge of securing raw materials, financing and collection (R. 2838). The evidence is clear that there was no one at the Corcoran plant, other than Louis Robinson and Gordon Hammond, who had any authority from the Boswell Company to employ or discharge any employees (R. 2634, 2839, 2840) or to speak or act for the Company on any employment matter (R. 2902, 2904, 2905). No one at the plant carried the title of foreman and Louis Robinson testified that he would describe Gordon Hammond as the foreman. However, there are employees who directed the manner in which work on particular jobs should be done (R. 2629-2631). None of these employees who direct certain jobs keep the time for other men on the same or any job. Gordon Hammond keeps the time for all of the men (R. 3182). There was no evidence that any of the men above mentioned, or any employees, other than Gordon Hammond or Louis Robinson possessed any authority to speak for the company on any question of its labor policy, or upon any other policy.

The following is an example of the evidence in the record: The undisputed evidence shows, for example, that **Rube Lloyd** is an expert carpenter and construction man (R. 2630), that he does not have any men under him at the plant, that when he does a job out-

side the plant he takes the men designated by Gordon Hammond to do the job, that Gordon Hammond usually goes with him to lay out the work, that Lloyd directs the work and Lloyd and the other men do the work. (R. 3179). He has no authority to employ or discharge employees (R. 2634).

O. W. Busby is the most experienced man in the machine shop (R. 2631). He has no authority to hire or discharge employees (R. 2634), and he does not keep time for any men working with him (R. 3182).

The only evidence regarding **Sitton** was that he was a nephew of Gordon Hammond and had worked for the company for about two and one-half years (R. 3147). He did not have authority to hire or fire employees (R. 2634).

The absence of any authority to hire or fire or speak for or bind the Company applies to each of the other men whom the Board contends are supervisors, to-wit: Tom Hammond, Joe Hammond, Kelly Hammond and Bill Robinson. (R. 3182, 2634, 2837-2839, 2629, 2630). The fact that the employees themselves recognized this limitation of authority is shown by the following testimony:

Martin testified that on November 18, 1938, after the trouble which occurred at the plant between union and non-union men on that day, they went into the office of Gordon Hammond who was in Los Angeles at that time. Among those present in the office were Rube Lloyd, Bill Nichols and Bill Robinson (R. 1217, 1218). In spite of the presence of those persons in the office he testified as follows: "We just waited there

for a long time, never did nobody with **authority** show up, and finally Mr. Robinson put his head out of the door and told us to go back to work, he would be around to straighten it out" (R. 1218, 1219, corrected pages 1277, 1278). Martin further testified that on the same day, after they left Gordon Hammond's office and went back to work, that he had a conversation with Bill Robinson during which Martin stated, "If Mr. Hammond and Mr. Louis Robinson comes down here and says 'Go home' all right, but until they do we won't" (R. 1222). He explained that he was referring to Gordon Hammond and Louis Robinson (R. 1240). According to Martin, Tom Hammond was among those present at the gins at that time (R. 1220).

Spear testified that on November 18, 1938, after they went back to the gins there was some difficulty about getting the non-union men to work with the union men (R. 1513). He stated that Kelly Hammond (R. 1508), Bill Robinson (R. 1509), Joe Hammond (R. 1517) and many others were around the gins, but he testified as follows: "as well as I can recall, I sat down on the stairs, in fact, I was stalling for time. I was **waiting for somebody to come around.**" (R. 1517 1518). He testified that he was waiting for Louis Robinson (R. 1602).

The only other testimony relating to the duties of the above mentioned men was the testimony of some of the complaining Federal members that they had from time to time been directed in the manner of doing their work by certain men above mentioned. Consequently, there is no evidence to support any finding

or conclusion that respondent Boswell Company was bound by any acts or statements by the persons hereinabove mentioned, and the evidence shows the contrary to be true.

The evidence is also quite clear that all of the men complaining in this proceeding recognized the fact that only Gordon Hammond and Louis Robinson could speak for the Company. One of the clearest illustrations of this recognition is the fact that in spite of all of the alleged anti-union statements which the complaining Federal men related, the alleged statements did not have the effect of preventing any of those men from joining the Federal. Every man who testified to any hostile statement against the Federal by other employees of the Boswell Company proceeded to apply for membership and join the Federal in spite of those statements. No evidence was introduced to show that the Federal lost a single member by reason of any action on the part of respondent Boswell Company.

A further illustration of the fact that Gordon Hammond and Louis Robinson were recognized by everyone as the only persons with authority was Prior's testimony that one of the reasons for his conference with Gordon Hammond on November 17th was that he wanted a clarification "by **someone in charge**" as to the status of Tom Hammond and Joe Hammond (R. 1158, 1159, 1161). Martin and Spear were with him during that conference and were told by Gordon Hammond that no one but Gordon Hammond had the right to hire or fire (R. 1158, 1159, 1163, 1164), and that neither Tom Hammond nor Joe Hammond was au-

thorized to make any statements against the Federal (R. 1159, 1163, 1164).

Prior testified that in a conference between himself, Martin and Louis Robinson on November 28, 1938, he told Louis Robinson that if "someone in authority" stated there were to be no arguments on the job there would be no opposition to the Federal. (R. 874).

That Gordon Hammond, with the exception of Louis Robinson, was the only one at the plant who had any authority to hire or fire men, and that his authority was generally recognized by and known to the employees and prospective applicants for work is also shown by the fact that in practically every instance the applicants for work made personal application to him.

In illustration of the above the following are some of the instances shown by the record where the complaining witnesses applied to Gordon Hammond for reemployment after a lay off:

H. N. Wingo testified that he applied to Gordon Hammond for work in the gin in October, 1938 (R. 1632, 1633).

L. E. Ely testified that he applied to Gordon Hammond when he was reemployed in October, 1938 (R. 1826).

W. R. Johnston testified that he applied to Gordon Hammond for work October 10, 1938 (R. 963).

O. L. Farr testified that he saw Gordon Hammond about reemployment in the fall of 1937 (R. 1027).

George J. Andrade testified that upon at least two occasions he applied for work after a previous lay off (R. 1715-1718).

There was no evidence that the Company ever held out any of the persons referred to in the purported Decision and Order as supervisory employees to be persons having authority to advise others regarding labor or union relations. On the contrary the Boswell Company had expressly denied that any of those persons had such authority or authority to hire or fire and this denial of authority was communicated to various Federal men and other employees. In addition to these facts, the evidence shows that instructions had been given to various employees not to make any statements against the Federal, or any other union, and that the alleged statements, if actually made by any of the employees mentioned, did not have the effect of hindering or discouraging the Federal's members, or any other employees of the Company, in any respect whatsoever.

There was no evidence whatever which would support the Board's findings and conclusions that Boswell Company either promoted and/or encouraged, or that it ratified any of the alleged discriminatory acts or statements on the part of any of its employees.

The neutral attitude of Boswell Company toward the right of its employees to join the Federal or any other union they might see fit, and its attitude of cooperation with the Federal was demonstrated time and again both to the members of the Federal and their officers and representatives, and to the employees as

a whole. For instance, the notice posted at the plant at the request of Mr. Larson of the Board was posted on the bulletin board in the office near the pay roll window in the main waiting room where employees were accustomed to look for notices of various kinds posted by the Company, such as Social Security bulletins, and where it could be readily seen by any and all of the employees. This notice remained posted for a period of more than fifteen days. (R. 2643, 2644). This location was approved by Mr. Larson of the Board. (R. 2644).

It is stated in the Board's brief (Footnote p. 20) that this notice was posted at the "insistence" of a Board agent, the implication being that the Company was not willing to post the notice. There was no evidence which would justify this statement, but on the contrary the evidence showed that the Company was entirely agreeable to posting the notice and that the officials of the Company did not in anywise object to or raise any issue regarding the posting thereof.

Another specific instance of the Company's position with respect to its employees' right to join any labor organization or not as they saw fit was Farr's testimony that in a conversation with Gordon Hammond in the latter part of August, 1938, Mr. Hammond told him "I can't tell you not to join a Union, for it is agin' the law for me to tell you that."(R. 1033, 1034).

There was absolutely no evidence to warrant the inference as found by the Board that the alleged discriminatory remarks made by subordinate employees of the Company, such as Tom Hammond, Joe Ham-

mond, Bill Robinson and the other alleged supervisors, represented the attitude of the Company or to support the conclusion that the Company was as responsible for these alleged activities as if it had directed them in advance.

The testimony clearly demonstrates and shows that if in fact, there was any anti-union conduct or statements on the part of any of the so-called supervisory employees, such conduct and statements were merely isolated expressions of individual opinion made without the knowledge of the Company and contrary to the policy of the Company and its instructions to them, and the record shows that whatever may have been said or done by them left the employees unmoved.

The Board in its decision lays much stress upon, and in its brief calls particular attention to, a number of so-called anti-union statements alleged to have been made by Tom Hammond, Joe Hammond and Bill Robinson at various times to certain of the complaining witnesses, including Spear and Farr.

Spear testified that some time in September, 1938, Joe Hammond accused him of being president of the union, which fact Spear denied (R. 1576). However, this did not deter Spear from applying for membership in the Federal on September 2, 1938 (R. 1493; 1576) and later becoming its president. Spear admitted that as early as July, 1938 Gordon Hammond had told him that so far as the Company was concerned Spear was absolutely free to join any union he wanted; and that Gordon Hammond made similar statements to him

upon several later occasions (R. 1575).

The evidence shows that Farr signed an application for membership in the union September 2, 1938 (R. 1014; 1052). Farr testified upon direct examination that during the latter part of August, 1938, Gordon Hammond asked him if he was a member of the union and spoke to him about reports that he was carrying a receipt book and signing up members on the job, to all of which Farr gave a negative reply (R. 985). He also testified that in September, 1938, both Joe Hammond and Tom Hammond spoke to him regarding the union (R. 985; 994), and that Tom Hammond also spoke to him again on November 17, 1938, (R. 989-992); and that between March and August, 1938 he was asked by Joe Hammond and Tom Hammond several times if he was a member of the union (R. 1035). The evidence is clear that Farr joined the union after most of these alleged anti-union statements were made. Moreover he reluctantly admitted upon cross-examination that Gordon Hammond had told him as early as August, 1938, that it was against the law for Gordon Hammond to tell him not to join the union (R. 1033, 1034).

Martin was also one of the complaining witnesses who testified to alleged anti-union statements made to him by Tom Hammond in the latter part of September, 1938 (R. 1207-1209). The evidence shows that Martin joined the union September 2, 1938 and that he talked with numerous other employees about the union after he joined, but nevertheless he was later re-employed on October 10, 1938 at an increase in pay. (R. 1230,

1231). Martin was also a member of the union committee headed by Spear which conferred with Gordon Hammond about October 5th or 10th, 1938, at which conference the matter of pressure being put on some of the union members was called to Gordon Hammond's attention, and Gordon Hammond stated that if anything like that was going on, he did not know about it and did not authorize it (R. 1520-1527).

Wingo and Andrade each testified to alleged anti-union statements on the part of some of the so-called supervisory employees (R. 1616-1618; 1702, 1703), but the evidence shows that they each joined the union on September 2, 1938 after the alleged statements were made (R. 1616; 1702).

As a Matter of Law the Boswell Company is not responsible for and is not bound by anti-union statements alleged to have been made by some of its employees.

Under the law as it has existed for many years, an employer cannot be held responsible for the statements or actions of his employees unless they are acting or speaking within the scope of their authority. This is one of the fundamental principles of law which existed long before the enactment of the National Labor Relations Act. If an employer were held responsible for every act or statement by any employee working for him, an intolerable burden would be placed upon the employer. It would be impossible for an employer to control the individual thoughts and actions of the numerous employees necessary in the operation of

any industrial plant. Since the adoption of the National Labor Relations Act, the courts have adhered to the principles previously existing and have held that no such burden or responsibility is placed upon the employer for the acts of his employees outside the scope of their authority.

Consequently, in order to hold an employer responsible for the acts and statements of his employees, the Board has the burden of proving (1) that the statements or actions were made or done by employees who were authorized to speak for their employer and (2) that those statements or acts were made or done on behalf of the employer and that they did not merely represent the individual opinions of the employees making the statements or doing the acts. Some of the cases in which the above principle has been applied to the National Labor Relations Act are the following:

Ballston-Stillwater Knitting Co. v. N. L. R. B.
(Seventh Circuit, August 1, 1938), 98 Fed. (2d) 758;

Cupples Co. Manufacturers v. N. L. R. B.
(Eighth Circuit, August 1, 1939), 106 Fed. (2d) 100;

N. L. R. B. v. Sands Manufacturing Company
(January 12, 1939), 306 U. S. 332; 83 L. Ed. 682;

N. L. R. B. v. Empire Furniture Co.
(Sixth Circuit, November 8, 1939), 107 Fed. (2d) 92;

N. L. R. B. v. Swank Products
(Third Circuit, December 29, 1939), 108 Fed. (2d) 872;

C. G. Conn Limited v. N. L. R. B.
(Seventh Circuit, December 22, 1939), 108 Fed. (2d) 390;

Peninsular and Occidental S. S. Co. v. N. L. R. B. (Fifth Circuit, July 29, 1938), 98 Fed. (2d) 411.

All of the foregoing cases are authority for the proposition that an employer is not responsible for the anti-union statements of his employees, or **even his supervisory employees,** unless the evidence shows that the acts or statements were done or made on behalf of the employer and not as a mere expression of the individual employee's opinion.

In **N. L. R. B. v. Sands Manufacturing Co.,** supra, the evidence showed that the employer there involved had negotiated with the complaining Union on various occasions, but there was testimony by one of the employees that his superior, a shipping clerk, told him that they were trying to break the Union and would hire him back when that was done. There was also testimony that the superintendent had stated to this employee that the A. F. of L. Union would be preferable as it was more conservative and not so likely to strike. The board contended that the employer was bound by these statements. The Supreme Court stated (83 L. Ed. 689):

> "Neither of the men who are quoted held such a position that his statements are evidence of the company's policy * * * and the inference of hostility to MESA drawn from their testimony does not, in any event, amount to a scintilla when considered in the light of respondent's long course of conduct in respect of Union activities and in dealing freely and candidly with MESA."

In **Cupples Co., Manufacturers v. N. L. R. B.,** supra, there was considerable evidence that a certain fore-

lady and foreman, both of whom had authority to make recommendations relative to the efficiency of employees, had made many statements against the complaining Union and in favor of an independent Union. The Board contended that the employer was bound by these statements and actions and was responsible therefor. The court held that the employer was not responsible for these actions, and stated at pages 114-116:

> "It seems to us that the question of her title is unimportant, and that the vital question is whether, under the evidence, she was or could reasonably be found to be the representative of the Company in connection with her activities relating to the two labor unions.
>
> "It is elementary that a principal is only bound by the acts of an agent which are within the scope of the actual, implied or apparent authority of that agent. Miss Weitzel had no actual authority from the Company to encourage or discourage memberships in labor organizations. There is no evidence which would support a finding that she had implied authority to do so. Implied authority is nothing more than actual authority circumstantially proved. * * * So far as her apparent authority is concerned: 'It is only acts within the scope of the apparent authority with which the principal clothes the agent, not those within the scope of the apparent authority with which the agent wrongfully clothes himself, without the assent or knowledge of his principal, that are binding upon the latter.' * * *
>
> "There is no evidence in the record that Miss Weitzel was ever held out by the Company as a person having authority to advise others with respect to joining or not joining labor organizations. What her fellow-employees of the match department may have assumed her authority to be and

what she may have represented it to be, we regard as unimportant in so far as the Company is concerned, since there is no proof that her acts which are complained of were done at its direction or with its knowledge or consent."

The court in the above case also pointed out that instructions had been given by the employer to the foreman that the law permitted the employees to organize and to refrain from discouraging them; that there was no evidence that the management knew of the threats, authorized them, or ratified them; that the employees apparently paid no attention to the alleged threats and that they had ready access to those in actual authority to complain of any grievances. The court stated as follows:

> **"If the persons making such threats had no power to discharge, it is difficult to see any more reason for imputing such threats to the employer than for imputing to him a similar argument made by an ordinary employee in soliciting members** — * * *
>
> "We think that the doctrine of respondeat superior cannot, under the circumstances disclosed by the evidence in this case, be invoked by the Board to justify its finding that the Company dominated, interfered with and supported the formation or administration of the Association. As already pointed out, Miss Weitzel, in encouraging and attempting to influence members of the force with whom she was associated to join the Association, was engaged in the performance of no duty for the Company, was acting outside of the scope of her employment, and can hardly be said to have been furthering the business of her employer, even though she may have believed that she was doing so. If the doctrine is applicable to her situation, it would seem to be equally applicable

to every other employee who solicited members for the independent union, and the necessary result would be that all such employees might be regarded as acting for the Company and not for themselves." (emphasis supplied).

In **N. L. R. B. v. Empire Furniture Company,** supra, there was evidence that several of the foremen, **with power to hire and fire,** had made many statements antagonistic to the complaining Union. The Court, in holding that the employer was not responsible for these statements, stated that there was no evidence that these observations reflected the view of the management, and stated as follows at page 94:

> "It appears from the record that several of the respondent's foremen were hostile to unionization. While these foremen were entrusted with complete responsibility for hiring and discharging men, it by no means follows from this circumstance that an irrebuttable or even a reasonable inference arises that a lay-off or discharge was for union activity when the annual labor turnover was 200 and there is cumulative evidence contra. We must search the record for something more substantial and definite to sustain the findings."

In **C. G. Conn Limited v. N. L. R. B.,** supra, the court stated that in considering the anti-union statements made by certain supervisory employees it was necessary to consider the general attitude of the employer in respect to the union. The court pointed out that the employer was at all times willing to meet and did meet with the union representatives and discussed problems with them, that there was no evidence to show that the management was unfriendly toward

the union, and there was no evidence of a refusal to bargain with it. Furthermore, the evidence showed in that case that the employer had instructed the foreman and supervisors that membership in a union was not to be considered in hiring men. Under these circumstances, the court stated that even if such statements were made they could not be binding upon the employer in view of the employer's attitude toward the union.

In **N. L. R. B. v. Swank Products**, supra, the court stated:

> "Because men expressed dislike to organized labor does not, as the Board suggests in its argument, indicate that they must be acting for the management."

In **Martel Mills v. N. L. R. B., 114 Fed. (2d) 624,** (C. C. A. 4, 1940,) the superintendent, who was a policy-making officer of the respondent, made certain anti-union statements, but the court set aside the Board's order in its entirety, stating, (p. 633)

> "In the absence of evidence of any policy of proscribed discrimination, an employer should not be held strictly accountable for every isolated utterance of a policy-making officer concerning union activities . . . . . And, where the conduct and actions of the employer fail to indicate any violation of the Act, an assemblage of unrelated, unconnected expressions of opinion does not very deeply impress this court."

In **N. L. R. B. v. Mathieson Alkali Works, Inc., 114 Fed. (2d) 796 (C. C. A. 4, 1940),** the Court denied the Board's petition for enforcement where the evidence showed that although a number of foremen, of supervisory capacity, had made occasional anti-union

expressions, but the company had pursued a neutral policy and did not authorize such statements. The court in its opinion stated:

> "Sporadic activities on the part of foremen, however, not authorized by the employer and not resulting in interference with or domination of the right of the employees to organize and select bargaining representatives of their own choosing, should not be allowed to nullify a choice freely made by a majority of the employees acting on their own initiative." (p. 799)

> "There is some evidence of sporadic and occasional expressions of anti-union sentiment on the part of a few foremen including one or two in addition to the ones heretofore mentioned, but, without reviewing this in detail it is sufficient to say that it furnishes no proof of any unfair attitude on the part of respondent and was not of a character to justify a cease and desist order on the ground that the expressions were attributable to respondent under the doctrine of respondeat superior. If there were evidence that these foremen were speaking with the authority of respondent, or if their expressions of sentiment were so numerous or of such a character as to justify the inference that they were made with respondent's approval in furtherance of an anti-union policy, an order directing respondent to cease and desist from interfering with its employees in the exercise of the rights guaranteed by Sec. 7 of the Act would be proper, even though it should not appear that anyone's affiliation had been changed thereby; . . . . . But mere isolated expressions of minor supervisory employees, which appear to be nothing more than the utterance of individual views, not authorized by the employer and not of such a character or made under such circumstances as to justify the conclusion that they are an expression of his policy,

will not ordinarily justify a finding against him." (p. 802)

"In each case, the question of the employer's responsibility for expressions of supervisory employees is to be determined by the facts of the case. If the supervisory employee is of such a position as to represent the employer in conducting a branch or department of the business, his expressions and activities with respect to organization would ordinarily consitute effective interference with the exercise of rights by employees and should be attributed to the employer, in application of the respondeat superior doctrine . . . . . Even if the supervisory position of the employee is of minor character the employer may be held responsible for his conduct if the surrounding circumstances are such as to reasonably justify the inference that it is an expression of the employer's policy or is approved by the employer. . . . . Where, however, the employee has only minor supervisory authority and the expression of views appears to be nothing more than the expression of ideas of his own, contrary to the neutral policy assumed by the employer, it cannot reasonably support a finding of violation of the Act on the part of the employer." (p. 803)

In **The Press Co., Inc. v. N. L. R. B., 118 Fed (2d) 937 (Ct. App., D. C. 1940)** the court stated: (p. 942).

"Before oral statements of an employer may be held to be an unfair labor practice, it must appear that they interfered with, restrained, or coerced employees in the rights guaranteed by the Act, that is to say, the right to join labor organizations, to bargain collectively, and to engage in concerted activities."

In **E. I. du Pont de Nemours & Co., et al. v. N. L. R. B., 116 Fed. (2d) 388, (C. C. A. 4, 1940)** the court in holding that the employer was not bound by sundry

anti-union statements of its supervisory employees, reaffirmed its holdings and the language used in Martel Mills Corporation v. N. L. R. B., supra, and in N. L. R. B. v. Mathieson Alkali Works, Inc., supra.

In **N. L. R. B. v. Sparks-Withington Co. 119 Fed. (2d) 78,** (C. C. A. 6, 1941), the court in denying the Board's petition for enforcement of dis-establishment order which was based upon certain activities of foremen, stated: (p. 82)

> "These incidents, in the light of what we have noted about the company's hand-off policy, sift down simply to instances of personal zealousness and individual bias against the union on the part of two supervisory employees, Poole and Darling. There is no evidence that their activities or statements represented company policies; there is positive evidence to the contrary. The statements involve little more than expressions of individual opinion, which, so far as the record goes, left the employees unmoved."

In **Quaker State Oil Refining Corp., v. N. L. R. B. 119 Fed. (2d) 631** (C. C. A. 3 1941), the court set aside the Board's order for reinstatement upon the ground that there was no substantial evidence. The court held the company was not responsible for anti-union statements of two of its supervisory employees, since those statements were not authorized or made in the course of their duty. The court stated: (p. 632)

> "The supervisors in question were Healy, the field or pipe line superintendent, and McElhatten, the superintendent of maintenance at the refinery. Healy asked one employee what the employees figured could be gained by membership in the union and said it would be lots cheaper and the employees just as far ahead if they hired a

local attorney to represent them rather than putting out quite a lot of money and not getting much in return for it. He made similar remarks to another employee and declared to a third who said he hoped to gain seniority rights that there was no such thing. To a fourth he said he did not see how the Union could benefit the employees and that he believed the petitioner would shut the plant down before giving recognition to it. McElhatten stated to one employee with reference to the welding of certain tubes that prior to the Union that work would have been done at the petitioner's shop but after the Union they intended to send the work away. He also said that in the future they would let out to contractors what work they could. He made a similar statement to another employee. In the case of Healy none of the employees to whom he talked was under his supervision.

"It is quite clear that all of the conversations took place casually in the course of conversations between the individuals concerned. There is no evidence that they had the slightest effect in actually preventing or discouraging membership in the Union. The Board nevertheless found that the petitioner was responsible for the statements made by Healy and McElhatten and that thereby it interfered with . . . . . its employees in the exercise of the rights of self-organization. . . . . We do not think that this finding is supported by substantial evidence. Isolated statements by minor supervisory employees made casually in conversations with fellow employees without the knowledge of their employer and not in the course of their duty or in the exercise of their delegated authority over those employees ought not to be too quickly imputed to their employer as its breach of the law. . . . . This is particularly so where, as here, there is no evidence of any policy on the part of the employer to authorize or encourage opposition to union activity."

In **Diamond T. Motor Car Company v. N. L. R. B., 119 Fed. (2d) 978, 982** (C. C. A. 7, 1941), it appears that the superintendent of the company not only ran a newspaper article and spoke to the assembled employees and by indirection expressed a preference for an inside union, but told one of the employees directly that the company would not stand for an outside union and they would lose their jobs. The court said that this statement should be considered in the light of the effect it had upon the listener, whom it apparently did not impress, and that moreover the man who was highest in authority at the plant subsequently told the men they were free to join any organization of their choice, and that this expression overrode and disavowed the previous expression of the superintendent.

In **Wilson & Co., Inc. v. N. L. R. B. 120 Fed. (2d) 913** (C. C. A. 7, 1941), the court held that unauthorized statements by a subordinate superintendent of the employer suggesting that the striking employees forget the union and return to work was not evidence of unfair practices by the employer. The court said: (p. 920).

> "Assuming that the statements are susceptible of the construction placed upon them, which we doubt, there is no evidence that the superintendent or any other officer of petitioner authorized them, or that they were made in conformity with petitioner's policy. In fact, the record demonstrates conclusively that petitioner's policy was to the contrary."

When the principles laid down by the courts in the foregoing decisions are applied to the facts of

the instant case, it is evident that the Boswell Company is not, and cannot be held responsible for any of the alleged conduct and statements of any of the so-called supervisory employees.

C. The Alleged Discriminatory Discharges.

The Board found that the Boswell Company discriminated with respect to the hire and tenure of employment of Elgin Ely, Spear, Martin, Farr, Wingo, Andrade and Powell, and ordered them reinstated with back pay (R. 618). However the Board, contrary to the finding of the Trial Examiner, found that the Boswell Company did not discriminate with respect to the hire and tenure of employment of Gilmore, Boyd Ely, Winslow, Johnston, Griffin or Eugene Clark Ely, (R. 608), and dismissed the amended complaint insofar as it alleged discrimination with respect to them, (R. 622). Notwithstanding the fact that the Board found that there was no discrimination and dismissed the discriminatory charges as to this last named group of men, it ordered the Boswell Company to place their names upon a preferential list of its employees who are temporarily laid off following a system of seniority to such extent as theretofore had been applied in the conduct of its business, and offer them employment in their former or substantially equivalent positions if such employment becomes available and before hiring persons for such work, (R. 619).

The evidence shows that the operations of respondent Boswell Company were highly seasonal and that its employees were, to a large extent, seasonal

employees. There was no evidence whatever that the Boswell Company followed or had any system of seniority with respect to any of its employees. It hired them as its operations required more men, and it laid them off when its operations declined. Contrary to the findings of the Board, there was no evidence showing that the Company still regarded men as its employees when they were laid off or that the men had any such understanding. On the contrary the evidence showed that a lay-off was considered as a termination of employment.

The evidence showed that it was not the custom or practice to hold positions open for former employees who had previously been laid off for lack of work, but, on the contrary, the applicant who was qualified to perform the work when work was available was employed at the time of making application. There were a few instances, however, when Gordon Hammond got in touch with former employees, either personally or through messenger, and offered work to them.

The evidence also showed that when employees were laid off because of the lack of further work it was the custom and practice for the employees so laid off to seek and, if possible, obtain other employment, and there was no understanding or agreement of any sort that any employee so laid off should remain unemployed and wait until the Company later had employment available for him. Neither was there any understanding or agreement of any kind that after an employee was so laid off that the Company should

have first, or any, call on his future services. It is clear from the evidence that whenever an employee was laid off his employment absolutely terminated, and there was no obligation, either on the part of the Company to later re-employ him, or on the part of such former employee to subsequently accept employment by the Company.

The above is illustrated by the following which are a few examples from the record:

James W. Gilmore left his employment with the Boswell Company in July of 1930 and did not return until September, 1931. During that time he worked for other employers, including work at San Jose in a cold storage plant, work in fish canneries in Monterey and work upon the highway, (R. 1832, 1848, 1849).

R. K. Martin testified that he quit working for the Boswell Company on April 1, 1931, at which time he went back to Georgia and he did not return to work for the Company until August 4, 1934 (R. 1202). In September, 1937, Martin quit working for the Boswell Company and went to work for another employer. He didn't return to work at the Boswell plant until March, 1938 (R. 1206, 1226, 1227, 1254). After the mill closed down in the summer of 1938 and Martin was laid off he asked Gordon Hammond to notify him when the superintendent of the oil mill with another firm in Kingsburg wanted him to work (R. 1229).

L. A. Spear in the spring of 1933 was laid

off and he didn't return to work for the Boswell plant for eighteen months (R. 1491).

Steve J. Griffin ceased work for the Boswell Company in May, 1936, at which time he bought a hay baler and didn't return to the employ of the Company for three seasons (R. 1859).

Boyd Ely quit working for the Boswell Company in the latter part of May, 1937, and took a job in the grain harvest for 60 or 70 days, after which he applied to Gordon Hammond for work again and was put to work in September, 1937 (R. 1745, 1746, 1760, 1761). He testified that he left the employee of the Company in May, 1938, that he worked in the harvest that year and that he returned about July, 1938 (R. 1746).

H. N. Wingo was laid off in April, 1938, after which he secured a job with Tulare Land Company and worked for that company from April until June 9, 1938 (R. 1613, 1614).

Farr quit working for the Company in July, 1937, and went to work for the San Joaquin Cotton Company in Bakersfield where he worked for four months. He returned and again secured work at the Boswell Company on November 15, 1937 (R. 983).

All of the above are examples of men complaining in this case and illustrate the fact that Boswell Company employees did not consider themselves and were not considered by the Company as employees when they were not performing work for the Company.

The seasonal nature of the business of the Bos-

well Company and the great fluctuation of employment, all as shown by the undisputed evidence, precluded the Company from keeping any men who might be considered as regular employees. The decrease from a peak employment of 189 plant employees in the 1937-1938 season to a peak employment of 86 in the 1938-1939 season manifestly made it impossible for the Boswell Company to re-employ all former employees during this last mentioned season.

The evidence discloses the following facts with regard to the seven men who were ordered reinstated and the seven men who were ordered placed on a preferential hiring list:

(a) **L. E. (Elgin) Ely.**

The employment record of L. E. Ely is fully set forth in Exception No. 61, page 95, of Exceptions to the Intermediate Report (R. 260). The evidence shows that after he was first employed in September or October 1936, he was laid off frequently and worked only during the seasonal operations of the Boswell Company. During 1938 he was laid off on March 9th. He was re-employed in the lint room of the oil mill for two weeks in May, after which he was laid off and he was again re-employed in July and worked until the early part of August. He was again employed on October 24, 1938 when the oil mill started. He worked until November 16th, at which time he ceased working because of an injured thumb. He **never applied for work after that date** (R. 1790).

On November 28, 1938 he was still absent from

the plant with his injury, and the gin upon which he was working had shut down on November 26, 1938. Since he was not at the plant a registered letter was sent to him (R. 2862; Board's Exhibit No. 9), informing him of the fact that the job on which he had been working was completed and that his employment was terminated. There is no contradiction in the evidence that the job on which he had been working did actually end on November 26th, and this was in full accord with his employment and lay-offs in prior years, since his employment had been merely the performance of seasonal work and odd jobs.

He testified that he joined the Union on November 11, 1938 (R. 1784), but there was no evidence which showed or tended to show, that the management of the Boswell Company ever had any knowledge of his Union affiliations. There was no showing that the Boswell Company ever had work available for him after November 26, 1938.

It affirmatively appears from the record that L. E. Ely testified that he was not willing to accept re-employment by respondent Boswell Company at the same hours and pay received by him during the time he was employed by the Company (R. 1797-1799). His testimony in this respect was as follows:

> "Q. (By Mr. Mouritsen) If the National Labor Relations Board should order your reinstatement with back pay, would you accept employment with the J. G. Boswell Company?
>
> A. (Pause) Yes.
>
> Mr. Mouritsen: You may inquire.

Cross Examination

Q. (By Mr. Clark) Mr. Ely, you hesitated on that last question. Have you any reservation you wish to make to that answer? You understand what I mean?

A. Yes, I understand.

Q. Well, have you any, any qualification to that answer?

A. Well, I really wouldn't like to work at 12 hours a day again.

Q. You would not.

Now, what other conditions in the plant there as they existed at the time you worked at the Boswell Company would stand in the way of your accepting employment from that Company should the Board order your reinstatement?

Do you understand the question?

May I have it read, Mr. Examiner?

Trial Examiner Lindsay: Yes.

The Witness: Well I would like to get more money for my work.

Q. (By Mr. Clark) More money than the 35 cents an hour you were getting? A. Yes.

Q. Or the 40 cents an hour you were getting?

A. Either one.

Q. What?

A. Either one.

Q. More than the 40 cents too?

A. Yes.

. . . . .

Q. (By Mr. Clark) Well, you weren't satisfied

with your employment, Mr. Ely, then prior to November 14th, upon which date I think you told us you finally left the company?

. . . . .

The Witness: No."

Under these circumstances, the Board's order that Ely be reinstated with back pay would not be justified, in any event.

Cupples Co., Manufacturers v. N. L. R. B., supra.

In the above case the court stated at page 118:

"Surely an employer cannot be compelled to reinstate or pay persons unwilling to work for him."

(b) **George J. Andrade, O. L. Farr, R. K. Martin, L. A. Spear, H. N. Wingo and E. C. Powell.**

All of the foregoing men left respondent's plant on November 18, 1938.

The employment records of Andrade, Wingo and Spear are set forth in exception No. 97, page 188, of Exceptions to the Intermediate Report. (R. 367 to 373).

Farr's employment record is set forth in Exception No. 56, page 78, of Exceptions to the Intermediate Report (R. 240 to 250).

Martin's employment record is set forth in Exception No. 57, page 86, of Exceptions to the Intermediate Report (R. 250 to 255, inc.).

Powell's employment record is set forth in Exception No. 89, page 171 of Exceptions to the Intermediate Report (R. 349 to 355).

The evidence shows that all of the above men-

tioned men were seasonal employees. They worked only during the seasonal operations carried on by the respondent Boswell Company.

Martin worked for the company in 1930 but left in 1931 and did not apply for work again until 1934. He worked off and on during seasonal operations from 1934 to September, 1937, when he quit his employment and took a job with another firm until March, 1938. He was then employed by the Boswell Company and worked for two weeks when he was laid off. He went to Colorado and did not return until May 17, 1938. He was given a job at that time in the oil mill repairing machinery until the mill started, when he worked in the mill.

He joined the Union on September 2, 1938 (R. 1207). After September 2nd he took an active part in Union organization and the solicitation of members. He talked with numerous employees regarding joining the Union (R. 1230). He attended various Union meetings and took prospective members with him, and he talked about the Union with a lot of the employees, (R. 1231).

When the mill closed on September 27, 1938, Martin was laid off (R. 1229). Gordon Hammond testified that Martin told him he expected a job at Kingsburg with another company and asked Gordon Hammond to let him know when the superintendent called (R. 3013). This testimony was substantially confirmed by Martin (R. 1228, 1229).

On October 8, 1938, Prior as Union representative, had a conference with Gordon Hammond for

the purpose of discussing the re-employment of Martin and certain others (R. 3012-3014; 831-833).

Sometime in October, 1938, which date was fixed by Spear as between the 5th and 10th of October, Martin, Farr and Spear, acting **as a Union Committee,** called upon Gordon Hammond to discuss hours and working conditions (R. 1518-1520; 1532-1533).

After all of the foregoing, Martin was re-employed by the Boswell Company on October 10th, at which time his pay was raised from 40c to 50c per hour (R. 1228, 1229, 1204-1206), and he was given steady employment from that date until he left the Boswell plant on November 18, 1938 (R. 1229). He was carried on the payroll at the Boswell Company until November 26th, at which time the gin on which he had been working before he left (Gin No. 4) shut down and the job ended (R. 1232, 3005; 1244, 1245). His pay was continued until November 26th, even though he did no work for the company after November 18, 1938.

Martin never applied for work at the Boswell plant after November 18, 1938 (R. 3079; 1244).

Farr was first employed by the company at the commencement of the ginning season in 1936. He worked with occasional lay-offs until July 19, 1937, when he quit and went to work for the San Joaquin Cotton Oil Company at Bakersfield. He remained there for about four months, receiving the same pay and working the same hours as he had received and worked at the Boswell Company (R. 983, 984; 1025, 1026). He was re-employed by the Boswell Company

on November 15, 1937, and worked off and on until September 28, 1938. At that time he went to Oklahoma where he stayed until October 15th, 1938, (R. 984, 1041).

On September 2, 1938 he joined the Union, after which time he talked about the Union to other employees and invited them to meetings.

On October 8, 1938, Prior, as Union representative, had a conference with Gordon Hammond regarding the re-employment of Farr, as well as certain other Union men. After this conference, Farr was re-employed by the Company on October 15th, and worked until he left the plant on November 18th (R. 1041). He was carried on the payroll to and including December 3, 1938, at which time the gin on which he had been working before he left (Gin No. 2) closed and the job ended (R. 2872; 3004). His pay was continued until December 3rd even though he did no work after November 18th.

The evidence is undisputed that he **never applied for work at the Boswell plant after November 18th, 1938.** (R. 3079).

The Board failed to sustain its burden of proving that Farr has not secured other regular and substantially equivalent employment since he left the Boswell plant on November 18, 1938. It affirmatively appears from the record, by the testimony of Frank A. Mouritsen, attorney for the Board, that he permitted Farr to leave the hearing to accept employment elsewhere (R. 2798, 2799).

Andrade worked primarily when the gins or the mill operated. The record shows that he worked until

the mill closed in March, 1938; that he commenced work again when the mill opened May 3, 1938, and was laid off when it closed again May 17, 1938; that he went to work again when the mill opened July 1, 1938, and was laid off when the mill closed on September 27, 1938.

Andrade joined the Union September 2, 1938, (R. 1702). He was one of the Union men discussed by Prior in his conference with Gordon Hammond on October 8th. Shortly after this conference Andrade was re-employed as clean-up man in the gins. He testified that his work as clean-up man in October didn't take all of his time and he helped at various types of work whenever there was anything to be done. He left the plant on November 18, 1938 and received his pay until November 26, 1938, at which time his job was completed although he did no work after November 18th.

The evidence is uncontradicted that he **never applied for work at the Boswell plant after November 18, 1938** (R. 1713, 3079).

Wingo also worked at seasonal operations and was laid off in the week ending March 24, 1938 for a few days. He then got a job with the Tulare Land Company and worked at that job until June 9, 1938. He was re-employed by the Boswell Company about the 1st of July, 1938, and worked until the mill closed down in September 1938, when he was laid off.

Wingo made application for Union membership on September 2, 1938. Shortly after his lay-off in Sep-

tember he was re-employed and worked until he left the plant on November 18th, 1938.

He received his pay until December 3, 1938, at which time the gin on which he had been working closed. The evidence shows that he **never applied for work after November 18th (R. 1644).**

Spear was first employed in July, 1928. He testified to various lay-offs from time to time, and that in the spring of 1933 he left the Boswell plant and stayed away for eighteen months. He was re-employed by the Company in September, 1934, and was laid off from time to time after that. In February, 1938, he was laid off for two or three months until May or June, when he was again re-employed. He testified that as early as October 10, 1938, he realized the work was running short and that he had been told by Gordon Hammond that there was not enough work for the men employed unless the mill started. He also testified that the cotton crop in the 1938-1939 season was very short and that the work at the gins was running out about November 18th, 1938. (R. 1567).

Spear applied for Union membership on September 2nd, 1938 and was elected president of the Union. He said he let his membership be known around the plant (R. 1576, 1577). Spear, Farr and Martin, as a Union committee, had a conference with Gordon Hammond early in October. Spear testified that Gordon Hammond had told him long before that conference that the men were free to join any union. He continued to work until he left the plant on November 18th, 1938, and Prior testified that even on November 28th

Louis Robinson said that they had some work for Spear.

Spear received his pay until December 5, 1938, at which time the gin on which he had been working closed down. The evidence shows that **Spear did not apply for work after November 18th, 1938.** (R. 3080).

Powell did not work at the Boswell plant from about the first of 1938 until July 3, 1938. During a portion of that time he was in jail after having been convicted of a felony. His last job for the company was in the warehouse replacing an injured employee who usually worked there. (R. 2864).

Powell testified that he did not leave the plant on November 18th with the other men. He stated that he was put to work on the jobs of several of the Union men who had left, but he didn't want to do their work and so he left shortly afterward. As hereinafter shown, Powell's testimony was so thoroughly discredited that it is of little, if any, value.

It is stated in the Board's purported Decision and Order (R. 499, 530) that "Upon ascertaining that that was Winslow's job (referring to the events of November 18, 1938) Powell again declined to perform the work on the ground that he would be "scabbing". In the Board's brief it is stated that Powell declined an assignment to operate machines left vacant by the other Federal members on the ground that he would be "scabbing on the Union." (Brief p. 17). This reference to "scabbing on the Union" is directly contrary to the evidence. Powell tsetified in response to a question by Mr. Mouritsen that "I told Tommy Hammond

that I couldn't take that job, that was a Union boy's, and I would be scabbing on the Union." (R. 1284). However, upon objection of respondents' counsel the last portion of said answer was stricken from the record (R. 1286).

Powell never applied for work after he left the plant on November 18th, 1938. (R. 1296). His pay was continued until November 28th when he was notified that the injured man whom he had replaced had recovered (R. 2864).

(c) **James W. Gilmore.**

The employment record of Gilmore is set forth in some detail in Exception No.55, page 68 of Exceptions to Intermediate Report (R. 229). The evidence showed that although he worked for respondent Boswell Company off and on over a considerable period of time, he worked entirely in the performance of seasonal work in connection with the normal seasonal operations of the Company. He was frequently laid off and in 1930 left the employment of the Boswell Company and worked elsewhere for a period of about fifteen months. He testified that since 1936 he worked in the seed house of the mill and was laid off at times but when the mill was not running he would sometimes do odd jobs, such as painting and cutting weeds. He was laid off on March 19, 1938, for several weeks after the oil mill closed. He was re-employed on May 2, 1938, the day before the oil mill opened, and he was again laid off on May 17, 1938, when the mill closed (R. 791; 3069).

He testified **that after his lay-off on May 17th, 1938** he **never thereafter at any time applied for work** from

the Boswell Company again (R. 1854, 3078).

(d) **Boyd Ely and Walter Winslow.**

Winslow's employment record is set forth in some detail in Exception No. 62, page 102 of Exceptions to Intermediate Report (R. 267). He testified that he worked off and on for the Company and did odd jobs and a little bit of everything around the Boswell plant. He was laid off in March, 1938, when the mill shut down, for about a month. He then went back to work chopping weeds, but worked only part-time, probably a week on and a week off, during the summer of 1938. He was re-employed in September, 1938, when the gins started operating and worked for about two weeks, when he was again laid off. About the time the oil mill started he was re-employed and worked in the mill until November 15, 1938 (R. 1656). At that time the mill was closed down. The evidence shows that Winslow **never applied for work since his lay-off on November 15, 1938** (R. 1689). Winslow also testified that he was not initiated into the Union until **November 16, 1938,** and that he never attended any Union meetings until that date (R. 1686).

Boyd Ely's employment record is set forth in some detail in Exception No. 65, page 105 of Exceptions to Intermediate Report (R. 272). The evidence showed that he first commenced working for the Boswell Company in the summer of 1936, that he quit in the summer of 1937 and took a job in the grain harvest for sixty or seventy days, and that he also quit working for the Boswell Company in the summer of 1938 and work-

ed in the harvest. He was laid off at various times and he was re-employed by the Company about July, 1938, and shortly after that time began working in the mill as he had done previously. He was laid off on September 28, 1938, the day after the mill stopped operations (R. 1758, 1759).

Ely joined the Union on September 5, 1938 (R. 1762). After he was laid off in September, Prior, as a Union representative, held a conference with Gordon Hammond to discuss the re-employment of Boyd Ely and others who had been laid off (R. 3012, 3013). After the conference with Gordon Hammond, Ely was re-employed about October 15, 1938 and at that time his pay was raised from 35c to 45c per hour (R. 1759). He received this increased pay until he was laid off on November 14th. He stated that he was on the night shift at the mill and was laid off on the night of November 14th. Ely **never applied for work since November 15, 1938** (R. 1758).

The evidence affirmatively showed that Boyd Ely secured other regular and substantially equivalent employment since November 15th, 1938 (R. 1755, 1757).

The Board failed to offer evidence to satisfy its burden of proving that Walter Winslow had not obtained other regular substantially equivalent employment since his employment by the respondent Boswell Company ceased.

(e) **Stephen J. Griffin and W. R. Johnston.**

Griffin's employment record is set forth in Exception No. 70, page 117 of Exceptions to Intermediate Report (R. 285). The evidence shows that he was em-

ployed in 1932 but that in 1936 he bought a hay baler, after which he did contract work, and he did not again work for the Boswell Company for three seasons. He was again employed by the Boswell Company in the week ending August 5, 1938 and worked two days (R. 2986). He was then laid off and did no further work for the Boswell Company until the week ending October 13, 1938 (R. 2986). He was working on the planting seed. He was laid off on November 17, 1938 (R. 2981-2984). During the last week of his work he was engaged in clean-up work around the yard and hauling planting seed, and he worked from four to eleven hours a day during that week.

Gordon Hammond testified that Griffin was laid off because there was no work for him to do, and this is shown by the nature of work done by him just prior to his lay-off.

The undisputed evidence shows that practically all of the available planting seed had been handled at the time of Griffin's lay-off. Out of 1007 tons of planting seed set aside for the entire year, 879.4 tons had been sacked and stored in the warehouse. Fifty or sixty tons more had been sacked but had not been weighed (R. 3011), and practically all of the planting seed had been sacked and hauled (R. 3076). The evidence also showed that on November 17th, the day upon which Griffin was laid off, the Company had finished picking the cotton set aside for planting seed (R. 3011).

The evidence is undisputed that Griffin has **never applied for work from the Boswell Company since November 17, 1938** (R. 1912, 3078, 3079).

Griffin did not know when he joined the union but thought it was about November 15th or 16th, 1938 (R. 1864).

Johnston's employment record is set forth in Exception No. 71, page 124 of Exceptions to Intermediate Report (R. 294). Johnston was originally employed at the commencement of the ginning season in 1937 (R. 955, 956). Because of an injury in January, 1938, he left work and was not re-employed until about October 24, 1938, when the mill started running (R. 962, 963). He testified that he had recovered from his injury in June, 1938, but that he did not apply for work until October 10th (R. 963). From that time on until the closing of the mill Johnston was merely performing odd jobs (R. 950, 951). He was laid off when the mill closed on November 17th, 1938.

Johnston never applied for work after November 17th, 1938. (R. 963-965).

The evidence showed, as Gordon Hammond testified, that the work was running out at the time of Griffin's and Johnston's lay-offs on November 17th and this was further confirmed by the testimony of Prior relating to the conference between Prior, Farr, Martin, Spear and Gordon Hammond **on that day** at which they discussed the fact that the cotton was running out and the Union representatives suggested that the work be spread among the employees to prevent any more lay-offs than necessary. Prior testified that he knew a number of employees had been laid off and it was understood that there were probably going to be more laid off (R. 1156, 1157).

Furthermore, the Board failed in its burden of proving that Johnston and Griffin had not secured other regular and substantially equivalent employment.

The evidence affirmatively shows that Griffin had secured such employment (R. 1867, 1868).

Although Johnston said he was unemployed, Frank A. Mouritsen, attorney for the Board, was later called as a witness and he testified that Johnston had been called out of order so that he could take employment elsewhere, and that he had let him go for that purpose (R. 2798, 2799).

It also affirmatively appears from the record that Johnston's leg was operated upon in February, 1939, as a result of his previous injury, and that from February, 1939, to and including the time of the hearing in this proceeding, Johnston was incapacitated as a result of the operation and unable to do any type of work. During this time he received, and was receiving at the time of the hearing, workmen's compensation payments, as provided by law.

(f) **Eugene Clark Ely.**

The employment record of E. C. Ely is set forth in Exception No. 93, page 182 of Exceptions to the Intermediate Report (R. 360).

Ely, who was first employed in September, 1937, testified that he laid off at his own request on January 29, 1939, and when he returned to the plant on January 30th, 1939, he was told there was no work to do, but there might be some later on (R. 1922). He said he left the plant a little later and never applied for work after

that date (R. 1937).

Gordon Hammond testified that Ely was not laid off, that he told Ely to load cotton, but that he left the plant instead of working (R. 3077).

Ely testified that he applied for membership in the Federal January 2, 1939, and that he was initiated January 19, 1939 (R. 1923).

Ely also testified that he ran around with Union men during the fall of 1938, that he lived with Johnston and L. E. Ely during that time, that Gordon Hammond had been to the house where the three of them lived, and that he worked steadily from October, 1938 during all of that time until January 30th, 1939 (R. 1934, 1935, 1938).

The Board found that Ely was not laid off because of his Federal membership, but on the contrary left his job voluntarily (R. 568).

As shown by the foregoing, it was the usual practice of the Boswell Company to lay off the men above mentioned when the need for them no longer existed. It was common and customary for them to be laid off when the gins or mills shut down unless there was some other work around the plant for which they could be used, and there was no showing or evidence in this case that there was any other work available after the time the employment of each of them ceased.

The evidence, and particularly the uncontradicted evidence respecting the seasonal nature and extent of the operations of respondent Boswell Company and its customary practice of substantially reducing the number of employees at the end of each ginning season,

shows conclusively that the Company did not discriminate with respect to any of these fourteen men. For instance, the undisputed and stipulated evidence shows that the peak of the employment season each year is between October 15th and November 15th, and that the number of employees decreased in the later part of the season (R. 2998, 3000); that the number of employees, exclusive of office help, for the week ending October 27, 1938, was 86; that for the week ending November 17, 1938, the number was 84, and that this was approximately the peak of employment that year (R. 3000); and that by April 22, 1939, the number of plant employees had dropped to only 55 (R. 3012). Consequently it appears that 31 men, including the 14 Federal members in question, were necessarily laid off subsequent to October 27, 1938.

So far as disclosed by the evidence the 31 men so laid off included only the 14 members of the Federal whom the Board ordered reinstated or placed on a preferred list. Manifestly it would be unfair to the other 17 men who were laid off, and it would be contrary to the intent and purpose of the Act, to reinstate or give employment preference to the members of the Federal without equal consideration being given the other 17 men. For this reason the Board's order fails to effectuate the purpose of the Act and is punitive in its nature and is contrary to law, particularly so far as it relates to the placing of 7 of the Federal members on a preferential hiring list.

In **N.L.R.B. v. SUPERIOR TANNING CO., 117 Fed. (2d) 881,** (C.C.A. 7, 1940), the court refused to en-

force that part of the Board's order which directed the respondent company to place on a preferential hiring list 5 union members whose discharge was not found to be discriminatory, stating at page 891:

> "In view of respondent's conduct in this case the Board felt it 'possible that the respondent will not reemploy these five men, even if their former positions or substantially equivalent positions become available.' Accordingly the Board ordered the five men placed on a preferential list to be offered employment as it arises . . . We are convinced the action of the Board in this respect was neither necessary nor proper. We perceive no difference once the above allegations of the complaint are dismissed, between these five named employees and the many more who the record shows were also laid off during the same period. We appreciate the reasons assigned by the Board for the requirement in question but we think that the Board has gone beyond its statutory authority. Under the circumstances the exercise of such a power takes on a punitive character not contemplated by the act."

In **F. W. WOOLWORTH CO. v. N.L.R.B., 121 Fed. (2d) 658** (C.C.A. 2) it appears that the respondent company reduced its staff and laid off a number of employees, both union and non-union. The Board found that part of the union employees were discriminatorily discharged, but some of them were not, and directed that those who were discriminated against be reinstated and those who were not discriminated against be placed on a preferential hiring list. However, the Board in making its order with respect to the men who were to be placed on a preference list did not take into consideration the relative proportion of union

and non-union employees at the time of the lay-off. The court therefore held that the portion of the order relating to the preference list was erroneous, and modified the order to provide that the Company should be required to select from the preferred list only in the old proportion of union men to non-union. The court in its opinion stated at page 642:

> "The Board ordered that all who are not thus reinstated should be placed on a preference list to be offered employment as it becomes available. This, we think, was erroneous; in order to avoid the improper assumption that all new employees would be union men the petitioner should have been required to select men from the preference list only in the old proportion of union men, i.e., seven men out of ten should come from that list."

It is clear that the Board arrived at an erroneous conclusion with respect to all of the 14 Federal members and one which is contrary to law, particularly in the case of Elgin (L.E.) Ely and his brother Eugene Clark Ely.

As previously pointed out, Elgin Ely ceased working November 16, 1938 because of an injury, and did not thereafter apply to the Company for work at any time, notwithstanding the recovery from his injury about December 2, 1938. (R. 1795). The only possible basis for the Board's finding and conclusion that he was discriminated against was the letter which the Company sent him on November 28, 1938, after the gin at which he had previously worked was shut down for the season. Moreover, there was no evidence that the Company at the time of sending him such letter even knew of his Federal membership, and the Company

was fully justified in sending this letter, as he was not present at the plant working so as to be personally notified of the work shortage. Obviously the Board based its finding of discrimination merely upon the weakest kind of inference erroneously implied by the Board from the sending of this letter. Moreover, Elgin Ely, as heretofore pointed out, testified that he was unwilling to accept re-employment by the Company.

In the case of Eugene Clark Ely the undisputed evidence shows, and the Board so found, that he voluntarily quit his job on January 30, 1939, notwithstanding he was offered further work at that time. When he voluntarily severed the employer-employee relationship without any act of discrimination on the part of the Boswell Company, he thereby placed himself beyond the pale of the Act.

D. THE ALLEGED EVICTIONS

The evidence shows conclusively that the episode of November 18th, 1938, was solely a dispute between the non-union and union men.

The general antipathy of a great majority of the employees toward Prior's union or any other outside union first became apparent at the organizational meeting held by Prior in the American Legion Hall in Corcoran on July 13, 1938. He had previously sent invitations for the meeting to some thirty of the Boswell Company's employees whose names were on a list given him by Farr (R. 819), who in turn had obtained the list from Gilmore (R. 1048). Only six or eight men attended the meeting, including Gilmore and Weatherby who

were not then employed by the Boswell Company (R. 820). After Prior explained the purpose of the meeting, he was informed by an employee named Gonders "that the employees of the Boswell Company were one happy family . . . and that they really wanted no organization in the plant."

When it became apparent from the results of this meeting that the employees were not interested in his organization, Prior without having talked to anyone at all connected with the management of the company filed an 8 (1) charge with the National Labor Relations Board on July 17, 1938. He testified this was his next organizational activity. (R. 824). This charge was apparently based solely upon statements made to him by Gilmore and Weatherby. The charge was never served and was later withdrawn at the instance of Mr. Larson, an agent for the Board, as heretofore mentioned.

The evidence shows that the Union men wore their Union buttons to work for the first time on the morning of November 18, 1938, and that Gordon Hammond was not present at the plant between the hours of 8:30 A. M. and 7:00 P. M. of that day. The evidence further shows that the Union committee had held a conference with Gordon Hammond on November 17th, at which time they suggested a reduction in the working hours. The working hours were reduced in accordance with their suggestion.

When the employees held their gathering in the yard on the morning of November 18th, Spear testified that he started to tell the other men about the 8-hour plan which was being put into effect. It should be

borne in mind that a reduction of the working hours of any of the men likewise reduced their earnings since they were paid upon an hourly basis. Such a plan also would have caused some of the older employees to work less time and make less money so that some of the newer employees could share their earnings.

There is no evidence that the members of the Federal in anywise protested against or objected to attending the gathering in the plant yard on the morning of November 18th. On the contrary it is clear that they welcomed the opportunity of meeting with the rest of the employees and explaining the objects and advantages of the Union, and particularly what the Union committee had accomplished in the matter of reducing the working hours at its meeting with Gordon Hammond on the previous day.

The Board found there was no evidence to indicate that the non-union employees were actually resentful of the Federal's action in requesting a reduction of work hours (R. 531, 532), and that Bill Robinson and Kelly Hammond, two of the alleged supervisory employees, were the active leaders of the disturbance and the principal molesters of the Federal members (R. 532). The evidence shows, however, that such was not the case.

Martin in giving his version of the incidents of that morning testified that as he went out the door of the gin where he was working, he met Bill Robinson and they had the following conversation:

> "He (referring to Bill Robinson) says, Martin, we are going to have a little meeting out here to see

whether we are going to have this union or not. We want everybody to go out there and talk things over."

He said, "Now, Martin," he said, "Whatever you do, don't go out there and raise no racket.

I says, "O. K.," but I says, "I won't go out there and have some of those guys tell me to my face what I have heard to my back."

He said, "What is that?"

I said, "Talk has been going around that the Union was all right, not these God damned low down leaders."

I says, "I won't stand for that to my face."

He said, "I don't blame you." He said, "You got a right to your belief just the same as they have to theirs," and he said, "If you believe in the A. F. of L. Union that is O. K. I don't blame you for that."

I started on. He said, "Martin, whatever you do, don't raise no racket."

I said, "O. K."

(R. 1210, 1211).

Martin testified that he went to where the bunch of men were gathered between the two gins. He walked up to take part in the meeting and they began, wanted someone to start the conversation. Finally Jack Ely started the conversation. Jack Ely was a brother of the other Ely boys who either were at that time or later became members of the Federal, and he did not belong to the Federal. (R. 1937). Jack Ely, according to Martin's testimony, walked up to Farr and

said "Farr, we want to know about this union." Farr replied, "well, I don't know what you want to know about it." Ely said, "we want to know what there is to it." Farr replied that they didn't discuss their business outside of the meeting, and then somebody said "where is the president?" "Who is the president?" Farr said Mr. Spear was their president and somebody said "Bring him in." Spear then got up and walked over and said "Boys, what is it you want to know." Then Bill Nichols, one of the carpenters, said they wanted to know about Spear's union. (R. 1212). Spear said they were trying to help everybody—weren't working against anybody and were trying to keep everybody at work possible. Then Mr. Brown one of the engineers spoke up and said "throw them out." (R. 1215). Then three employees, namely, Tisdale, Sailsbury and John Duncan took hold of Spear and started out with him and marched him out the gate and over to Gordon Hammond's office (R. 1216, 1217).

Wingo, who also attended the gathering in the yard, testified that it was decided at a union meeting held around November 16, 1938 (R. 1618, 1619) that the union members would wear their union buttons at the plant and that they first wore their buttons at the plant on November 18th (R. 1620). He further testified that Mr. Brown, the day engineer, was one of the men who said "Let's throw them out" (R. 1624, 1625).

Farr testified that he worked until about ten o'clock on the morning of November 18th, when he walked over to the meeting. He testified that after he got there Jack Ely walked up to him and said "I want

to know about your damn union" (R. 996). Farr replied that it was not a union meeting and they did not discuss union activities on the job. Then some one in the crowd asked who was the president of the union, and when Farr told him Mr. Spear was, the crowd gathered around Spear. (R. 998, 999). Spear said that the union was only trying to make the working conditions for everybody better; that the talk had been of some lay-off and that they wanted shorter hours for that reason, that everybody should work and get their share of the work. Then some one in the crowd cried "let us throw them out. The Company is behind us." (R. 1000). However, Farr did not recognize anyone who made this remark. Three employees of the Company, namely Duncan, Tisdale and Sailsbury then took hold of Spear and pushed him towards the office (R. 1001). Farr admitted upon cross-examination that when Jack Ely told him they wanted to know about the union and asked why they wanted to turn against the Company, Farr did not tell him Gordon Hammond had previously told him, Farr, that the employees had a right to do as they wanted so far as joining a union was concerned (R. 1044).

Farr also testified that when he returned to the plant after having gone to Gordon Hammond's office he met a man by the name of Derischsweiler and his son, both of whom were gin employees (R. 1007, 1008), and these two men remarked that he was one of the union men and threatened to throw him out.

Andrade worked about four hours on the morning of November 18th before attending the gathering in

the yard. (R. 1705). His version of what occurred at the meeting was substantially as follows:

Somebody wanted to know what about the union and Jack Ely asked for the president (R. 1706). Farr said Spear was the president and the crowd gathered around Spear and somebody asked "What about the Union." Spear tried to answer, but somebody in the crowd hollered "Let's throw them out." Then three men grabbed Spear and went over to the office building.

Spear, who also attended the gathering on the morning of November 18th, testified this was the first time the Union men wore their Union buttons to the plant (R. 1494). He arrived at the plant a few minutes before ten o'clock to do some preliminary work before his gin started. Mr. Todd, the engineer, said he had been told not to start the engine as there was going to be a meeting. Spear then went to the gathering place (R. 1497, 1498). He saw some of the men talking with Farr (R. 1500) and something was mentioned about the president, and Farr said Spear was the president, so Spear walked up toward the bunch that was on the front end of the bale wagon. (R. 1501). Nichols asked what about the Union business (R. 1502). Spear started to explain to Nichols about the 8-hour plan that was being put into effect to save No. 4 gin from being laid off. (R. 1503). While explaining the matter Tisdale and Sailsbury took hold of him and they went over to Gordon Hammond's office (R. 1504).

District Attorney Roger R. Walch testified that on November 18, 1938 a group of four or five men came

to see him at his office in Hanford and said they were Boswell Company employees. They informed him that there had been a little misunderstanding that had arisen at the Boswell plant that morning (R. 903). He did not know these men personally and could not recall their names. They asked him what he knew about the Wagner Act and the possibility of the local employees forming an employees union at the Boswell plant. (R. 903, 904). They informed him they represented practically the unanimous feeling of the employees of the Boswell Company; that they didn't feel as though they desired to have an outside union come in; that there had been talk of the American Federation of Labor coming into the plant and they felt they would rather have their own bargaining agency. They stated there was some dissension and that seven or eight men at the plant had been talking up an American Federation of Labor Union affiliate. (R. 904, 905). They asked if he would represent them in organizing a union, and he informed them that as District Attorney he could not handle such matters (R. 905). He mentioned two local unions of employees which had recently been organized in the county, and suggested that they consult Attorney Clark Lament (Clement) from Lemoore if they were thinking of forming their own union (R. 905, 906).

Mr. Walch testified that he asked these men if the Boswell Company management had anything to do with the matter, and they assured him it did not and that the management did not even know they were coming up to consult with him and that they (this committee) were expressing the sentiment of the employees.

He asked them why they wanted their own and not an outside union, and they said they did not feel like paying tribute to an outside organization, that Boswell's had always treated them right and their wages were satisfactory, and they felt that inside of their own organization they could do better than having an outside bargaining power (R. 906).

Mr. Walch also testified that he discussed with them the trouble which had occurred at the plant that morning, and they told him that one or two men had been talking up the American Federation of Labor affiliate, and that they had gotten tired of the talk and didn't want to be bothered with them, and they had asked them to leave the premises. However no force of any consequence had been used. Mr. Walch then asked them if they had ejected the Union men from the premises on the authority of the Boswell people, and they said "No; Boswell hadn't done anything about it until it was all over." Mr. Walch then instructed them that they had no power or authority to eject anyone from anyone else's property and cautioned them against any repetition of the act (R. 907, 908).

The fact that the alleged eviction of certain of the members of the Federal was the result of resentment on the part of the non-union employees is also demonstrated by the letter written by Mr. Louis T. Robinson to the Los Angeles office of Boswell Company on November 18th shortly following the occurrence of the trouble at the plant. This letter was written while the trouble was fresh and read in part as follows:

"The following is a chronological account of

the labor trouble at our plant this morning:

For some time a Mr. Pryor representing himself as an organizer for the Vegetable Oil Workers' Union of Long Beach has been endeavoring to organize a local chapter of this union in our plant. He and his followers were never able to get enough members to form the union and after working several months they began to "put the heat on" our employees in an effort to force in more members. This was done by offering to accept membership without charge and by threatening to "Roll" the employees for their jobs if they did not join the union. The threat was made that soon the ginning season would be over and the non-union men fired and the union men retained in the jobs.

This morning at ten o'clock on their own volition, the employees, both union and non-union, agreed to have a meeting to discuss the matter. The three tentative officers of the local proposed chapter were at the meeting. According to the best information I could get, the meeting practically amounted to nothing but that the non-union men decided that the three tentative officers were making unnecessary disturbance and endangering their jobs. They therefore took the three union men and bodily threw them off the property. The employees then came to see me in a body and demanded that I fire the union men. They were pretty well worked up and I endeavored to calm them down and persuaded them to go back to work, both Union and non-union. They did go back to work but the non-union men evidently kept a little pressure on the union men and in a few minutes the union men left their jobs.

The non-union men then appointed a committee and the committee went to the District Attorney for instructions as to the best method of procedure for them to follow. It is my understanding the District Attorney advised them that up to date they were in the clear and suggested that they think the matter over carefully and determine on

the best possible method of handling the matter and that in the meantime, he would give the problem thought and continue to advise them." (R. 2601).

Mr. Louis T. Robinson testified that Gordon Hammond was not present at the plant on November 18, 1938 when the disturbance between the employees occurred, and when he saw Gordon Hammond on the morning of November 19th, he requested Mr. Hammond to make an investigation of the events of the previous day and to make a written report to him concerning the same. In response to this request Gordon Hammond on the same day, to wit, November 19th, made a written report which was introduced in evidence as Board's exhibit No. 25 (R. 2604; R. 2892-2894). Said report read as follows:

"November 19, 1938

Memo to: Mr. L. T. Robinson

From: Mr. G. L. Hammond

I have made quite a lot of inquiries into the trouble the employees had yesterday while I was away. There seems to have been a misunderstanding between some of the employees as to who would supervise the work and working hours at the plant, myself or the employees that had affiliated themselves with the A.F.L. Union.

It is my understanding that they had decided to get together at 10 o'clock when L. A. Spear came to work and see what it was all about, as he was President of the local Union. In trying to determine why and what the cause of the trouble was and of the rushing of L. A. Spear out of the gate and into the office, my understanding is that O. L. Farr, R. K. Martin and some of the others that possibly had joined the Union were passing the word along that they were giving them their last

chance to get in the union or they would lose their jobs, but were passing the buck to L. A. Spear and he wasn't there yet. That seems to be the reason of their closing down the gin after 10 o'clock.

I find that Lonnie Spear did get on the bale wagon and tell then that they were going to prorate the work and work eight hours only, and if they wanted to work here they would have to join their Union.

Then W. C. Nichols got up some place where he could ask Spear outright if he understood him to say that they were taking charge of all the work and Spear answered yes. Then Nichols asked Spear if he meant that for the boys to work here they would have to join the Union, and Lonnie answered that he meant that very thing.

Then someone in the crowd said 'Let's throw him out', and they proceeded to rush him out of the gate and into the office.

I am sure this would never have happened if I had been here, because everything was ok when I left about 8:30. I am very positive nothing like that would ever have happened anyway if Lonnie hadn't told them they were going to prorate the work and working hours and that they would have to join the Union to work here.

I think they should have continued to operate and let me handle the problem when they knew that I would be back that evening.

G. L. Hammond"

Gordon Hammond's investigation and report was made while the matter was still fresh in everyone's mind and under the circumstances not intended to be self-serving. Undoubtedly his report reflects the true facts and situation, and certainly is more credible and dependable than the testimony of the various Board witnesses given months later at the time of the hearing. His report shows the entire background of the matter

and demonstrates conclusively that the difficulty arose between the two groups or factions of men, solely as the result of a feeling on the part of the non-union employees that they did not want any outside union coming into the plant, and did not desire spreading of the work with less earnings to each individual, and did not desire to pay tribute to Prior's union.

There is no credible evidence that shows, or tends to show, that the meeting of the men on the morning of November 18th was known by either Gordon Hammond or Louis Robinson. The evidence affirmatively shows that no authorization was requested by, or given to, anyone to shut down the gins for the purpose of a meeting. The first knowledge that any official of the Company had of this occurence was when the men came into the office and some of them demanded the discharge of the Union men. At that time Louis Robinson instructed them all, both Union and non-union, to go back to work and that he would be around later to straighten it out. The men followed his instructions, but, according to the hearsay testimony of the complaining Union men, the non-union men, without ever consulting Louis Robinson, left the plant of their own free will.

That the Federal members were in no sense of the word evicted is clearly shown by their own testimony. Martin testified that after the men returned to their jobs after having been instructed by Louis Robinson so to do, Bill Robinson asked Martin what he was going to do, stating it seemed like either all the union men or the non-union men would run the plant.

Martin replied that if Mr. Hammond or Mr. Louis Robinson came down there and said "go home" all right, but until they did they would not. (R. 1222). The Union men stood around for a while. Bill Robinson asked what they were going to do. Andrade asked where Spear was. They went to the gin where Spear was and told him it seemed as though the boys weren't going to work with him. Spear said if that was the way the boys felt about it they would go home. Bill Robinson said it looked like the thing to do was to get it straightened out. (R. 1223). After conferring with Spear the men then went home after 15 or 20 minutes without going back to see Mr. Louis Robinson before they left the plant (R. 1241, 1242).

Powell, who also attended the gathering in the yard on the morning of November 18th, testified that he did not go to the office with the rest of the men and that the men returned from the office in about 10 minutes. (R. 1280, 1281). After the men returned from the office they said the employees weren't going to work for the Union men and that they left again. (R. 1282). Bill Robinson came along and told Powell to take No. 4 press, but he refused to take that job because he found it was Joe Briley's job, who was a member of the Union. (R. 1283, 1284). Tom Hammond then offered him a job on No. 1 press but he refused to take this job because it was where Wingo, another Union member, had been working. (R. 1289, 1290). Powell after talking with Bill Robinson then left the plant and went to Farr's residence (R. 1291).

Wingo testified that he did not go to the office with

the rest of the men who accompanied Spear there (R. 1625) but remained in the yard until the men returned from the office. Kelly Hammond came around and shut the motors off, and Wingo went home (R. 1626). As he went out the front door he remarked to Farr, "Let's go; there is no use trying to work here." (R. 1644).

Farr testified that after he returned to the gin following the gathering in the office, he started his machine and commenced ginning cotton. (R. 1004). Then Kelly Hammond and Bill Robinson shut down the machinery. (R. 1006) Farr walked over to Bill Robinson and asked him what to do about it. Bill Robinson replied that he had nothing to do about it. (R. 1006, 1007), and stated there didn't seem to be enough Union men to run the machinery and he would say they should go home,—that would be his advice. Wingo, who was also present, spoke up and asked Bill Robinson if he was telling them to go home as a foreman, and Robinson replied "no, not as a foreman, but that is my idea, that you men had better go home." (R. 1007). Farr stood around a little while and then walked out to the front door of the plant (R. 1007). Wingo came along and they both left the plant (R. 1010). This was about 11 o'clock. After he got home Farr testified that he telephoned Louis Robinson and told him what had occurred. (R. 1013).

Andrade testified that after the men left the administration building he went back to where he had previously been working. The machinery started then stopped and Andrade went into the gin building. (R.

1709). He met Martin on the outside and Bill Robinson walked up to them. Wingo was also there (R. 1710). Robinson told them there were not enough union men to run the gins; that they had to run and the non-union boys wouldn't work with them. Wingo asked if that was an order given as a foreman, and he said "no, that was just a suggestion to avoid further trouble." (R. 1711). Andrade testified that they figured they were through there and picked up their things and went to Farr's residence.

Andrade also testified that Farr, after telephoning Mr. Robinson November 18th, came to his home and told them that Mr. Robinson had said to rest easy; that their pay would go on until the matter was settled (R. 1738).

Spear testified that after Mr. Louis Robinson instructed the men to return to their jobs they all left immediately and returned to the job. Spear prepared to start up the No. 1 gin but the engine did not start and after a few minutes Kelly Hammond, Burdine and Mitchell came in (R. 1507-1509). Kelly Hammond and Bill Robinson stopped Farr's gin. (R. 1509). Bill Robinson told them that would not do, that Mr. Robinson wanted the machinery to run (R. 1511, 1512). Somebody said they weren't going to work with the Union men, (R. 1513) and Bill Robinson said if the Union men couldn't run the place they had better go home until the matter was straightened out. Farr asked if that was an order and Bill Robinson said "no, that is a request;" that he only wanted to straighten out the trouble and thought it would be a good idea for them to

go home. (R. 1514, 1515). Spear talked to Kelly Hammond about farming and then sat down on the stairs. He testified he was stalling for time waiting for someone to come around. Upon cross-examination he testified he was waiting for Mr. Louis Robinson to show up (R. 1602). However, Mr. Robinson never came out to straighten the matter out and Spear left and went to Farr's house (R. 1518).

The undisputed testimony shows that no official of the Company knew that the Federal members had left or that the non-union men refused to work with them until after the Federal members had left the premises. There was no evidence which in anyway connected the management of the Boswell Company with these unauthorized acts of the employees on November 18, 1938.

It is clear from the foregoing that the Board's finding that "representatives of the company initiated, led, and countenanced the entire anti-union demonstration" (R. 533) and were the principal molestors of the Federal members, is not only unsupported by the evidence, but is contrary thereto. There was no evidence whatever that any of the so-called supervisory employees either instigated or led the anti-union demonstration, nor was there any evidence that the so-called supervisory employees or any other representative of the management at any time discussed the union with the non-union men who were the actors in the incident of November 18, or that they incited any of the non-union employees by act or conduct of any other nature.

On the contrary it clearly appears from the hear-

say evidence of the complaining witnesses that one of the ringleaders in the demonstration was Jack Ely, who was not a member of the Federal and was merely a rank and file employee. Other non-union employees from the rank and file who actively participated in the demonstration were Bill Nichols, a carpenter, Mr. Brown, one of the engineers who was apparently the first to suggest that the union men be thrown out, and Tisdale, Sailsbury and Duncan, who led Spear to the administration building. The evidence is clear that the entire demonstration was a spontaneous uprising on the part of the great majority of the employees and was motivated solely by a feeling of resentment toward the Federal and its proposed program regarding the future operation of the plant.

E. THE ALLEGED REFUSAL TO REINSTATE

When Prior, Martin and Spear called at the office on November 19, 1938 and conferred with Louis Robinson and Gordon Hammond regarding the alleged evictions and the reinstatement of the Union men who had left the plant the previous day, Mr. Robinson informed them that the men could go back to work at any time but Prior stated they would need special protection. According to Mr. Robinson he told them he didn't think they needed special protection, and the Company would not furnish it, but they could go back to work, and he suggested that the Union men go and talk to the other employees and everything would be all right. The Union men indicated that they did not want to talk with the other employees, and Mr. Robinson told Gor-

don Hammond to feel out the men and see if any special protection was necessary. Even though Prior and his union committee did not accept Mr. Robinson's offer and return to work, the latter testified that he told them they would get their pay while the matter was being straightened out. Although there is some conflict upon this point, it is undisputed that all of the Federal members who left their jobs on the morning of November 18th did receive their pay without working until their respective jobs were completed.

On the afternoon of about November 26, 1938, or a little later, Prior, Spear and Martin conferred with Gordon Hammond. According to Mr. Hammond's testimony Prior stated that he wanted to know about putting the men who had left on November 18th back to work and Mr. Hammond told them they would take any of the men and all of them back when they had work for them, beginning the next morning or any time they wanted to come back. (R. 3024). Mr. Hammond's testimony with respect to this conference is uncontradicted.

The uncontradicted testimony of Gordon Hammond also shows that about November 27, 1938 he had another conference with Prior. At this conference Prior asked if the Company would take all of the men back in a body. When Mr. Hammond told him they didn't have work for all of the men at that time and could not take them all back in a body, Prior suggested that the Company take them all back and put them at the needless and unnecessary job of tearing down stacks of cake and re-stacking them for a few days.

Prior then stated that he would compel the Company to take all of the men back and threatened to tie up the plant if all the men were not immediately reinstated. (R. 3025).

On November 28th, 1938, Prior asked Louis Robinson about putting the men back to work, and Louis Robinson informed Prior that he would reemploy any of the men for whom there was work. He offered to re-employ Spear, but because he told Prior that Martin's job had been completed, Prior laid down the ultimatum that unless all of them were given work none of them would work. The evidence was uncontradicted that there was not sufficient work at the plant for all of them on November 28th, which was practically the end of the ginning season that year. Mr. Robinson's testimony that since November 18, 1938 there had not been positions available at the plant for all of the men who left on that day unless the Boswell Company laid off some men that were on the jobs at that time, was not only uncontradicted, but was fully supported by the other evidence and testimony in the case.

The testimony and evidence also shows conclusively that the Boswell Company did not employ any new or additional men after November 18, 1938 to complete the small amount of work which still remained to be performed before the ginning season ended, and that the work was completed with the men who were working at the plant prior to November 18 and remained on the job after that date.

The fact that the Boswell company did not replace any of the men who left, and in fact had no occasion to

do so in view of the undisputed fact that there was no work available, is as a matter of law sufficient to justify the Court in denying enforcement of the purported Order of the Board for the reinstatement with back pay of the seven Federal members who were ordered reinstated.

Union Drawn Steel Co. v. N. L. R. B., 109 Fed. (2d), 587, 592 (C. C. A. 3, 1940).

N. L. R. B. v. Yale & Towne Mfg. Co., 114 Fed. (2d), 376, 379 (C. C. A. 2).

F. W. Poe Mfg. Co. v. N. L. R. B. 119 Fed. (2d) 45, 48, (C. C A 4, 1941).

N L. R. B. v. Wilson Line Inc., 122 Fed. (2d), 809, 814 (C. C. A. 3, 1941).

N. L. R B. v Lightner Publishing Corporation, 128 Fed (2d) 237, 241 (C. C. A. 7, 1942).

In **Union Drawn Steel Company v. N. L. R. B.,** supra, the Court held that the Board was not justified in ordering the reinstatement of a striker inasmuch as there was no position open for him at the time. The Court said at page 592:

> "We come now to the question as to whether that part of the Board's order requiring the reinstatement of Eurick with back pay should be enforced. Had Union filled Eurick's place with another sweeper or laborer, there would be no question but that this portion of the order would be enforceable . . . . The right of the employer, for general economic reasons, to make use of a smaller staff to operate his business, to decrease his production, or to go out of business entirely if he desires to do so, we regard as indubitable. For example, if an employer has employed ten men to operate ten machines, he may, for such reasons, employ only nine men to operate the ten machines or he may operate only nine machines with only

nine men, or, if he chooses he may cease all operations."

In **N. L. R. B. v. Yale & Towne Mfg Company,** supra, the Court supported a finding of the Board that three employees of the respondent company had been discriminatorily discharged. The Board had ordered all three of the men reinstated. The court, however, modified the Board's reinstatement order because of the company's evidence that after the hearing it had reinstated two of the discharged employees, one of whom was later laid off for lack of work and the other of whom immediately quit, and that the job of the third had been done away with due to a change in operating conditions. The Court said (p. 379):

> "If these assertions are true, and the petitioner's brief does not question them, the enforcement order to be entered by this Court should take note of them by appropriate provisions."

In **N. L. R. B. v. Wilson Line Inc.,** supra, the respondent operated an excursion steamer during four months of the year only. The Board ordered a number of employees who had been discriminated against reinstated with back pay, and directed that the Company pay "a sum of money equal to that which they would normally have earned as wages" less their net earnings during that period. The Court with respect to this back pay order stated at page 814:

> "Likewise since the respondent is under no obligation to employ more men than its curtailed activities require . . . . the Board's order may not be construed to mean that the respondent must rein-

> state men for whom under its curtailed program no work is available, except through the displacement of employees having greater rights. Nor may it be required to give back pay to discharged employees for periods during which there would have been no work for them because of the curtailment."

Under these circumstances, there was no evidence which would in anyway justify the finding of the Board that the Boswell Company had discriminated against any of the men or that it had caused any of them to lose their employment. Although Prior denied that he instructed the men not to apply for work at the Boswell Company, the evidence is uncontradicted that none of them ever did apply for work after November 18, 1938. His statements made first to Gordon Hammond and later to Louis Robinson demonstrated conclusively that he assumed to act for all of his union members who left work on November 18, and that he did not intend to permit any of them to return to work unless and until they were all re-employed, notwithstanding the fact that he not only knew, but was also informed, that at the time his plea for reinstatement was made, there was not sufficient work available at the plant for all of his men.

A somewhat similar situation existed in the case of **N. L. R. B. v. Asheville Hosiery Company 108 Fed. (2d) 235, (C. C. A. 4, 1939)**, where certain non-union men ejected the union men from the premises. The Board in that case held the employer responsible for the action of the union men on the ground that its conduct caused the employees to engage in the ouster and because it refused to offer the union men uncondition-

al reinstatement under a guarantee of protection. That portion of the order was reversed. Although there was evidence that the manager of the plant had made threats to a union leader that they might lose their jobs, and although the manager made speeches to the employees before the ouster intimating that the plant would be shut down if a Union was organized, the court held that the evidence was insufficient to show that the company was responsible for the ouster. The court stated at page 292:

> "There is no substantial ground for the rejection of the overwhelming evidence that the hostile attitude of the great majority of the workers toward the Union proceeded from their sincere and spontaneous dislike of outside interference; and it is not enough to say that the management shared this feeling and manifested it in the statements of its supervisory officials."

The court in the above case then held that it would have been mere speculation or conjecture to conclude that the company was responsible for the action of its employees in that action, and that the Board has the burden of proving its case with sufficient evidence to warrant the submission of such a case to a jury.

The Board in its Brief in connection with its discussion of the alleged refusal of the Boswell Company to reinstate the men, calls attention to certain alleged conversations which Spear, Farr and Powell each testified he had with Gordon Hammond at various times after November 18, 1938, during the course of which Gordon Hammond reputedly stated to each of them that he could return to work, but would have to drop

the union. Gordon Hammond categorically denied having made any such statement to any or either of these men at any time. When this straightforward and unimpeached testimony given in connection with this entire case is set against the testimony of these men, which in many respects is patently improbable and is thoroughly discredited and impeached, particularly in the case of Powell, it is clear that Gordon Hammond's version of the conversations which were had with these men was the only competent and reliable testimony with respect thereto and is entitled to full weight and credence.

Spear's testimony regarding his alleged conversations with Gordon Hammond after November 18, 1938, was as follows:

Spear testified upon direct examination that upon the afternoon of November 19, 1938, he talked with Gordon Hammond in the latter's office. He testified that Gordon Hammond told him they couldn't put over the union; that if the Company recognized the union it would probably cause friction between the union men and the other men; that he had no hard feelings toward Spear, and Spear could come back to work if he wanted to drop the union business. Spear testified he told Gordon Hammond "He wouldn't come back unless the other boys could come back" and that Gordon Hammond replied that Spear could come back but he didn't know about some of the others. (R. 1539-1542).

Upon cross-examination Spear fixed the date of this conversation as being in the early part of December, 1938, when he returned to the plant to get his tool

box. (R. 1545, 1546). When asked if Gordon Hammond told him why he didn't come back to work, Spear replied "Never", and then went on to testify that during this conversation Gordon Hammond offered to re-employ him, but the offer was not accepted. (R. 1547).

Gordon Hammond testified that on November 19, 1938, he investigated the incidents of November 18, 1938, preparatory to making a report on this incident to Louis Robinson, one of the employees he talked with was Spear. (R. 3176). He testified that he sent word to Spear to call at his office. (R. 3053), and when Spear arrived about 3 p. m. on November 19, 1938, he asked Spear regarding the cause of the difficulty of the day before. Spear said that that morning (referring to November 18th) someone told him about the meeting in the yard, and he said it was fine—that he thought they were going to ask him or talk to him about the union. Spear then told Gordon Hammond what had occurred. Gordon Hammond denied that during this conversation he said anything whatever to Spear regarding his returning to work or dropping the union. The evidence shows there was no purpose or occasion for Gordon Hammond to discuss the matter of Spear's re-employment with him at this time, as earlier on that same day Gordon Hammond had participated in the conference between Prior, Martin, Spear and Louis Robinson, at which Robinson had said the men could go back at any time, but Prior refused to let them return unless the Company would furnish special protection, following which Louis Robinson had informed them that if they did not go back to work they would

get their pay anyway until some determination of the matter.

Gordon Hammond further testified that he next talked with Spear about December 9, 1938, when the latter came to the plant to get some tools, and that when he asked Spear if he or any of the other men were coming back to work, Spear replied that he didn't think he would because he was planning on making a crop and so was Farr; that at the last union meeting Prior had taken it all out of their hands, and he didn't know what they were going to do; that Prior said he had a job for Martin, two of the Ely boys, and Johnston down south the first of January. Gordon Hammond testified he told Spear at this time that he could come back to work, but denied having told him he would have to drop the union. (R. 3053-3056).

Gordon Hammond also testified that he again talked with Spear about December 19th or 20th, 1938, when the latter returned to get his tool box. He testified that he asked Spear if he had found any land yet, and Spear replied that he hadn't made a deal, but he and Farr were both looking at some land. This was the extent of the conversation. (R. 3056, 3057).

Farr's testimony with regard to his alleged conversation with Gordon Hammond after November 18, 1938, was as follows:

He testified that he went to the Company's office about November 26, 1938, for the purpose of getting his check, and upon going to Gordon Hammond's office found Spear was there. While there he spoke to Gordon Hammond about coming back to work, and the lat-

ter informed him that "under these conditions" they could not use him at that time. (R. 1090).

Gordon Hammond in his testimony denied having any such conversation with Farr, either at the time testified to by Farr, or at any other time. (R. 3030, 3031).

Even assuming that Farr's testimony was true, and that Gordon Hammond's denial was disregarded, it is clear that the words "under these conditions" did not have the significance or meaning which the Board placed thereon. The evidence shows without contradiction or dispute that it was just about the time of Farr's alleged conversation that Prior called upon Gordon Hammond and demanded that all the men be taken back in a body, and suggested, if necessary, in order to provide work, that they be given a job for a few days tearing down and restacking sacks of cake, and threatened that if all the men were not immediately reinstated, he would tie up the whole plant. (R. 3024-3026). The expression "under these conditions", if such expression was in fact used, can only refer to the conditions exacted by Prior that all of the men be taken back in a body regardless of whether or not there was any work available for them.

Powell's entire testimony was, as hereinafter clearly demonstrated thoroughly discredited and impeached, and none of his testimony, and particularly that regarding alleged conversations with Gordon Hammond after as well as before November 18, 1938, is entitled to no weight or consideration whatsoever.

Gordon Hammond testified he never told Powell

at any time, either in substance or effect, that the union was all "hooey"—that it was just a bunch of fellows claiming something they couldn't back up (R. 3039); and that he did not tell Powell at any time that he could have a job if he would discontinue union activities. (R. 3041).

Gordon Hammond testified that the only times he talked with Powell after November 18, 1938, were as follows:

About November 28, 1938, Powell came to the office and wanted someone to write the insurance company regarding his injured finger. Gordon Hammond testified that he asked Powell what they were going to do, if they or he were coming back to work, and Powell replied that Prior would not let him. (R. 3040).

The only other conversation with Powell was in the latter part of December, 1938, or the first part of January, 1939. Upon this occasion Powell had a letter from the insurance company and wanted to know if there was a compensation check for him at the office. This was all that was said. (R. 3041, 3042).

When the evidence is viewed in its entirety, it clearly appears that when the dissension arose between the two groups of union and non-union employees, culminating in a number of the union employees leaving the plant on the morning of November 18, 1938, because the non-union employees apparently refused to work with them, the Boswell Company was confronted with and faced a very delicate and difficult situation, and one which would never have arisen had it not been for the fact that the plant superintendent,

Gordon Hammond, was absent from the plant that day.

The evidence shows without any contradiction or dispute that for several months prior to November 18, 1938, the Boswell Company and its employees were facing a grave un-employment situation by reason of the shortage of cotton and cotton seed to gin and process. Everyone, including Mr. Prior and the members of his union, as well as the management of the Boswell Company and all of its employees, knew and recognized that the 1938-39 ginning season would be very short and that there would be considerably less employment available and for a fewer number of men than had been the case in the previous season.

When Prior first contacted Mr. Louis Robinson on September 2, 1938, which was nearly a month before the ginning season commenced, Mr. Robinson called his attention to the fact that the Company was faced with a serious employment situation as they knew they would not have over a 10,000 bale cotton run, and he hoped Prior would not do anything that would aggravate the condition. (R. 2841). As a matter of fact the total number of bales ginned that season was only 9,944 (R. 3000), of which amount 6,785 bales, or more than two-thirds were ginned prior to November 18, 1938 (R. 3006).

Spear testified that when he, Martin and Farr, acting as union committee, met with Gordon Hammond about October 5th or 10th, 1938, for the purpose of trying to workout a schedule for the mill and gins in order to keep the men from being laid off, there were some men then working at the plant who were really not

needed. They were not doing very much work. (R. 1529).

When the oil mill shut down about September 27, 1938, a number of men were laid off, and it appeared unlikely that they would be re-employed. Prior therefore met with Gordon Hammond on October 8, 1938, and discussed the matter of re-employment of the men who had been laid off and not re-employed. Four of the eight men laid off were members of Prior's union, but so far as the evidence shows the other four were not. Gordon Hammond told him these four men had not been re-employed because they were not experienced in any part of the plant which was then operating, but he would give Prior's four men some work if they would apply. (R. 831, 832). Thereafter Prior's four men, namely, Andrade, Martin, Boyd Ely, and Farr applied for and obtained employment.

As a result of Prior's meeting with Gordon Hammond on October 8, 1938, and the meeting between the union committee and Gordon Hammond which was held along about the same time, the Company opened up and operated the oil mill between October 24 and November 15, 1938. The Company already had a large supply of cottonseed cake on hand and it would have been easier to store and hold the cotton seed uncrushed than the by-products from it, and there was no particular reason for operating the mill at that time, aside from providing additional employment.

When the oil mill closed down on November 17, 1938, a number of the men who had been working in the mill were necessarily laid off. Prior then went to

Gordon Hammond and told him they knew a number of men had been laid off and others would probably be laid off because of the smaller acreage and scarcity of cotton that year, and Prior and Spear, Martin and Farr, who had been called from their jobs in the plant for the purpose of attending the meeting, all suggested that the working hours be reduced to eight hours a day so that everyone would get a little work, rather than some of the men being laid off. There was no question raised as to the rate of pay, and in fact Spear stated that the union was not asking for any increase in pay, and that they were all familiar with the fact that there was a scarcity of cotton crop that year and they were familiar with conditions. They did not even discuss the re-employment of the men who had been laid off when the oil mill shut down. During this meeting Gordon Hammond informed them that he had intended closing down gin No. 4 that day. They asked him if there was not some way whereby the gin could be operated longer, and he told them he would see if he could not workout some plan to do so.

The evidence shows that as the result of this meeting the Company did not close down No. 4 gin as originally planned, but on the contrary Gordon Hammond issued instructions that commencing with the following day, November 18, 1938, all four of the gins should continue operating, but with shorter hours of operation.

The undisputed and stipulated evidence shows that one of the gins (No. 4) finally closed November 25, 1938, after operating off and on and some days less

than 12 hours; that one of the gins (No. 2) finally closed December 3, 1938; that one of the gins (No. 1) closed December 5, 1938; thereafter running part time until December 30, 1938. About half of the days during this last mentioned period this gin did not operate at all, and some of the days it did operate during said period it only operated two or three hours or half a day. The last of the four gins (No. 3) finally closed January 24, 1939, and operated only part time, because of lack of cotton to gin. The oil mill did not operate after November 15, 1938, except for a few days at a time after January 5, 1939, and then only for the purpose either of taking care of hot seeds and preventing spoilage thereof or for producing cake to be used as cattle feed.

The evidence shows without dispute that on November 18, 1938, the season was rapidly drawing to a close and the unemployment situation was becoming very acute, and all of the employees knew it would be only a matter of a very short time before a large number of them would be laid off because of the lack of any further work to be performed.

The flare-up occurring between the union and non-union groups of employees was, shown by the evidence, directly attributable to the employment situation and the attitude assumed by the union group that they were going to see that they had jobs at the plant regardless of any resulting loss of employment of the non-union group. All the employees realized it was merely a question of who would be laid off first and how many. This flare-up between the two groups of employees occur-

red without any advance warning or notice to the management of the company and on one of the few days that Gordon Hammond happened to be absent from the plant. When the non-union employees showed no inclination to continue working with the union men and some of the union group left the plant, Mr. Robinson was unexpectedly and suddenly confronted with a very unusual and serious situation. He and the Company, as shown by the evidence, had at all times since Prior first began his organizational activities in the early part of the year, endeavored to avoid any labor troubles and to maintain and preserve a neutral position insofar as the organization of the employees was concerned, and in fact fully co-operated with Prior and his union every time they made any suggestions regarding the ~~nized thsi limitation of authority is shown by the fol-~~ improvement of employment conditions. It was, as above pointed out, practically the end of the season and the Company was naturally interested in and concerned with completing the season's ginning work as expeditiously as possible, and without any interemployees animus if same could possibly be avoided.

The management when confronted with this unexpected, serious and unusual situation very properly concluded that the best solution of the problem under the circumstances and one which would be fair to all of its employees and would not work any hardship on any of them, and at the same time would permit the completion of the ginning, was to carry the Federal members, who had left the plant, on the pay-roll until such time as the jobs at which they had been working

on November 18, 1938, would terminate anyway in the normal course of events.

There was absolutely no evidence which would support even an inference that the Company was discriminating or intended to in anywise discriminate against any of the men because of their union membership or otherwise. Had such been the case the Company would not have re-employed Joe Briley when he applied for work shortly after November 18th, and who was a member of Prior's union; nor would it have employed the other members of Prior's union, such as Lawrence Galvan, Ygnacio Galvin, M. Escobedo and Pete Galvan, all of whom continued to work from time to time as work was available, and without the necessity of any special protection being provided by the Company.

By adopting the procedure which was followed by the Boswell Company in this matter all of the members of the Federal who left the plant on the morning of November 18, 1938, received the same amount of pay which they would have received had they remained at the plant and continued to work until the end of the season, and the Company was able to and did complete the season's work without employing any new men or having to replace any of the Federal members who left. The evidence established very conclusively that the Boswell Company acted reasonably under the circumstances and did not discriminate against anyone.

The Board, both in its purported Decision and Order and in its Brief, attaches great importance to the letters which were sent by the Company to the various men who left the plant on the morning of Novem-

ber 18, 1938, notifying them that the operations in connection with which they had been employed and were being carried on the pay-roll had ceased. Mr. Louis Robinson's testimony as to the motive for these letters is logical and plausible. He testified that although it is not the usual practice of the Company to send registered letters to its employees informing them they have been laid off (R. 2933, 2934), where the employee is present at the plant when his job runs out (R. 2935), in the instant case the men in question were not present at the plant, and the sending of the letters was the most appropriate method of advising them of the normal termination of their respective jobs.

He had previously notified their representatives on November 19, 1938 that they would each be carried on the pay roll until the situation which resulted from the incidents of November 18 was straightened out, and he testified he thought it would be wise to mail each of them a letter so there would be no misunderstanding about the amount of pay which they might have coming (R. 2934).

Moreover the evidence shows that Louis Robinson had no direct contact with any of these Federal members after the conference with Prior, Martin and Spear on November 19, and consequently he wanted each of the men to know when his job ended and to counteract any erroneous impression which may have been in the minds of any of these men that the Company was wilfully refusing to permit them to return to work, in view of the position taken by Prior at his meetings with the Company's officials on November 27 and 28,

at which he had laid down the ultimatum that if all were not re-employmed, none of them would return.

The sending of the registered letters may have been unusual, but it is clear that the Company was confronted with a very unusual situation, and it handled the same in the best possible manner for all concerned.

Although Elgin Ely was not one of the men who left the plant on the morning of November 18, 1938, having left prior to said date because of an injured finger, he likewise was not available when the gin on which he had previously been working closed down, and it can not be said that it was unusual or in any way improper for the Company to notify him by letter that the ginning operation on which he had been employed was ended.

The evidence shows Elgin Ely joined the Federal November 11, 1938, but there was no evidence whatever that the Company knew of his membership in the Federal prior to the time of sending him the letter on November 28, 1938. So far as disclosed by the record the first time he did anything which would probably have the effect of calling the management's attention to the fact that he was a Federal member was when he participated in the picketing commencing December 2, 1938 (R. 1796). He testified that he never applied to the Company for work after November 14, 1938 and that he was unwilling to accept reinstatement with the same pay and hours which prevailed when he left. According to his testimony he was incapacitated by his hand injury from performing any work until December 2, 1938, and the undisputed evidence shows that

prior to that date the operation in connection with which he was last employed had come to a normal seasonal close. He was not physically able to perform any work at the time Prior discussed the reinstatement of the other men with Gordon Hammond on November 26 and 27, and with Louis Robinson on November 28, and so far as disclosed by the evidence Prior, as representative of the Federal, never at any time requested the reinstatement of Elgin Ely. Clearly Elgin Ely was not discriminated against in any way, and the Boswell Company cannot legally be required to reinstate him with back pay as ordered by the Board

It will be noted that none of the registered letters of which the Board complains were sent out until after Prior laid down his ultimatum to the management that unless all of the men who left the plant on November 18 were immediately reinstated, regardless of the amount of work available, he would tie up the plant to a point where none of its products could be moved.

As elsewhere pointed out in this Brief, the lay-off of any of the employees was considered both by the Company and by the employee as a final termination of the employment without any future obligation on the part of either one. This practice was well known to and recognized by all of the men as the evidence is replete with instances where the complaining union men themselves returned to the plant and applied for work after various lay-offs. Consequently the evidence does not support the finding

and contention of the Board that the receipt by them of the letters sent out by the Company indicated that further application for reinstatement would be futile.

In the case of Powell, the evidence shows without dispute that he did not leave the plant on the morning of November 18, 1938 because of any refusal on the part of the non-union employees to work with him, but on the contrary he left of his own free will and accord when there was work available for him to do, and did not thereafter at any time apply for work. As he testified, he decided to "just string along with the union." Moreover, as shown by the letter which was sent him by the Company on November 28, 1938 (R. 2864; Boswell's Exhibit No. 16) the job on which Powell had been working at the time he left the plant was the regular job of another employee named Fred Armenta, who was temporarily off because of an injury, but had recovered and returned to work on his regular job before November 28, 1938, and consequently Powell's services were no longer required at that time.

Furthermore the undisputed evidence shows that Powell, during the period of his last employment at the plant, was mostly engaged in the performance of odd jobs—as he put it "school boy jobs." (R. 1316). This also supports the other showings in the record that further work for Powell was practically exhausted at the time he left the plant.

Powell admitted from the witness stand in this case that he had previously been convicted of two

felonies, namely, a conviction in the State of Georgia on a stabbing charge (R. 1347), and a conviction in Kings County, California in January, 1938, on a bad check charge. In connection with this last mentioned conviction he served four months in the county jail as part of three years probation (R. 1303). He also admitted that prior to coming to California he had been indicted for murder. Powell's general worthlessness and criminal career is lucidly set forth in the record and is hereafter more fully set forth in this brief in connection with our discussion of his credibility as a witness.

In N. L. R. B. v. Federal Bearings Co. Inc., et al, 109 Fed. (2d) 945 (C. C. A. 2, Feb. 1940) it was held that the conviction of an employee for crime is justification for the refusal of the employer to reinstate him even though he has been wrongfully discharged.

On the basis of Powell's criminal record and the above cited decision, the Board's order for Powell's reinstatement is clearly unenforceable.

The Board found and states in its brief (p. 23) that "the Federal made one more attempt on January 18, 1939 when Prior inquired whether Robinson had changed his attitude with respect to reinstatement of the Federal members; Robinson's reply was that his position was unaltered." The record shows that this is neither a true nor a complete statement of the testimony upon which the above quoted statement is founded.

As previously related in our statement of facts, the record shows that on January 17, 1939 a meeting

was held at the Company's office at which there were present Prior and a number of Federal members representing the Federal; Mr. Louis Robinson and Mr. William Boswell representing the Boswell Company; Mr. Maurice Howard, a field examiner of the Board, and certain of the Boswell Company employees (R. 875, 876; 2875). During the course of this meeting the incidents of November 18, 1938 were discussed, and Mr. Howard made the statement among others that if he had been in Spear's place he would have shot all three of the men who led Spear to the office (R. 2876, 2877). During the course of this meeting Louis Robinson also again made clear and reaffirmed his previous statements to Prior upon several occasions that no foreman or anyone else was authorized by the Company to make any statements regarding any employee's membership or non-membership in any union, and that no employee's position would be affected because of membership in any union (R. 2887). On the following morning, to wit, January 18, 1939, Mr. Howard returned to the office and had a further conversation with Louis Robinson without anyone else being present (R. 2886). In the course of this last mentioned conversation Mr. Howard demanded that the company discharge all the non-union employees who had taken part in the events of the morning of November 18, 1938 and that the company hire Federal members in their places. He also demanded that the employees association be dissolved. When Louis Robinson stated it would be impossible for him to comply with these demands and refused

to accede thereto, Mr. Howard stated that if his demands were not complied with, he would call the Labor Board hearing and Mr. Robinson would get a lot worse. Mr. Howard took a pamphlet containing a number of Labor Board decisions out of his pocket and pointed out some of the decisions. When Mr. Robinson informed Mr. Howard that he thought none of those cases were similar to the Boswell Company's position, Mr. Howard stated, "all right, then you will get the Board hearing," (R. 2889, 2890). Mr. Robinson's testimony regarding this last mentioned conversation with Mr. Howard on the morning of January 18, 1939 was neither disputed nor denied.

Prior testified that he also called upon Louis Robinson on January 18, 1939 and informed Mr. Robinson that Mr. Howard had advised him to have a conference with Mr. Robinson for the purpose of determining whether or not Mr. Robinson's attitude and opinion had changed in reference to the refusal to reinstate the men that had been discharged prior to November 18, and those that had been evicted from the plant on November 18, and Mr. Robinson stated that his opinion had not changed, that he had not changed his position (R. 878). However, Mr. Prior in his testimony did not fix the time of this conversation. Louis Robinson testified that the conversation with Mr. Howard took place on the morning of January 18, 1939, and that the conversation with Prior took place on the afternoon of that day (R. 2891). He testified that when Prior called in the afternoon he said he was calling at the suggestion of Mr. Howard, and wanted

to know if there had been any change in the Company's position **after Mr. Howard's visit.** Mr. Robinson replied that Mr. Howard's visit had not changed the Company's position at all (R. 2892). This testimony of Mr. Robinson respecting the order of the two conferences was not denied.

The Board for obvious reasons makes no mention or reference whatever either in its Decision and Order or its brief to the conference held on the morning of January 18, 1939 between Mr. Howard and Louis Robinson. The Trial Examiner in his Intermediate Report likewise ignored the testimony with respect to said conference. It is clear that the finding made by the Board with respect to Prior's conference with Louis Robinson on the afternoon of January 18, 1939 can only be interpreted in light of the preceding conference between Louis Robinson and Mr. Howard; and when Louis Robinson told Prior that the Company's position had not changed since Mr. Howard's visit he had in mind the illegal and improper demands made by Mr. Howard not only that all the Federal members be reinstated, but that the Company in addition thereto should discharge all of the non-union employees who had taken part in the anti-union demonstration on the morning of November 18, 1938 and should also dis-establish the Association.

In addition to all the other reasons advanced above, it is clear under the law that if the Boswell Company owed any duty (which it did not) to reinstate the Federal members who left their jobs on November 18, 1938, that duty was discharged when

on November 26, and again on November 28, 1938, the officials of the Company offered Prior, as representative of the Federal, to take back any or all of those men when there was work available. When Prior rejected this proper offer by requiring as a condition for the return of any of the men that they be all taken back in a body, despite the lack of work at that time for all of them, the Boswell Company was thereby relieved of any possible obligation or duty to make any further offer of reinstatement. It was also thereby relieved from any liability for payment of back wages subsequent to the date of the offer. **N. L. R. B. v. Riverside Mfg. Co. 119 Fed. (2d) 302-307 (C. C. A. 5, 1941).**

F. THE ASSOCIATION

On the morning of November 18, 1938, after the disturbance in the plant yard, three of the employees came to see Louis Robinson and asked what they should do in connection with the disturbance. Louis Robinson told them he was not in a position to advise them and they would have to seek other advice (R. 2617).

A committee of five employees then went to Mr. Walch, the District Attorney of Kings County, and asked his advice. They informed him that the Boswell Company did not know they were going to see him but that they wanted to find out about organizing their own union because it was the sentiment of the employees that they did not want to pay tribute to an outside organization (R. 904, 905). The District Attorney

advised them that under the Wagner Act they had the right to organize their own union but he could not represent them because he had to be unhampered in order to handle labor troubles. He told them that independent unions had been formed at the Caminol Co. and the Lucerne Creamery, and suggested that Attorney Clerk Clement of Lemoore was more familiar with the Wagner Act than any other attorney in the county (R. 905, 906).

That afternoon three of the employees came to see Louis Robinson. They told him they had seen the District Attorney and had asked him about forming an employees' association and that the District Attorney had told them that such associations existed at the Caminol Co. and at the Lucerne Creamery (R. 2621). This was the first knowledge Louis Robinson had that any employees had gone to the District Attorney (R. 2621) and it was the first knowledge he had of the existence of employees' associations at the two companies mentioned.

That evening, after working hours, about 7:00 P. M. a group of employees met in the lobby of the administration building (R. 2448-2450) and discussed their conference with the District Attorney. About 70 employees attended and they discussed the possibility of organizing an employees' association. (R. 2404, 2405). They decided to hold a meeting later with Attorney Clement and discuss it (R. 2348). The evidence shows no connection whatsoever between Louis Robinson or any official of the Boswell Company and

the holding of this meeting on the evening of November 18th.

The men evidently gathered at this meeting before Gordon Hammond returned to the plant from Los Angeles on the evening of November 18th, as he testified that after he returned to the plant that evening he went to his office which was in another part of the administration building and started to make up the time cards for the men who had worked that day during his absence (R. 3125). When he was about half finished with the time cards he was called out of the office to weigh some cotton at the scale house and before leaving the office to weigh the cotton he talked with E. M. Roberson and Rube Lloyd, but there was no one else present (R. 3134). He asked them what the crowd was doing in the front office. They outlined to him the occurrences of that morning in the yard, and told him the men had come to the office that evening for the purpose of letting the Company know they were satisfied with their work and the way it was being managed and conditions in every way (R. 3135, 3136). This was the extent of Mr. Hammond's knowledge of the meeting.

Eugene Clark Ely testified that all but one or two of the employees attended the meeting on the evening of November 18th (R. 2346). The blank sheet of paper which was circulated and signed that evening contained 53 names (R. 2451, Board's Exhibit No. 19).

All the other meetings were held away from the plant. The organizational meeting was held November 28, 1938 in the American Legion Hall. As shown

by the minutes, 77 employees attended this meeting, including Eugene Clark Ely, Joe Briley, Ygnacio Galvan and Andrew Galvan (R. 2424, 2425). The evidence showed that these last three named men had joined the Federal some time prior to the date of this meeting, and that Eugene Clark Ely joined the Federal some time later (R. 2357). The employees hired Attorney Clement who attended the meeting and prepared the constitution and by-laws (R.2449). Attorney Clement also explained the set up with respect to the Association (R. 2350), and the constitution and by-laws were adopted. (R. 2406) (R. 2372, Board's Exhibit No. 18). Officers were also elected at this meeting (R. 2406). The Association collected dues from its members and paid its attorney (R. 2424, 2449). No financial aid or assistance of any type was given by the Boswell Company to the Association (R. 2424), and no official of the Boswell Company ever attended any of the meetings of the Association or participated in the formation or operation of the Association in any manner. (R. 2624).

Subsequent to the organizational meeting of November 28, 1938, 23 additional employees joined the Association (R. 2425) making a total membership of 100. Among the employees who became mmebers after November 28th were M. Escobedo, Lawrence Galvan and P. Galvan (R. 2426). Escobedo and P. Galvan were charter members of the Federal. (R. 840).

On November 29, 1938, the Association wrote the Boswell Company a letter, advising that the Association had been organized the previous day by 78 employees of the Company at Corcoran, which constituted

about 95% of the Corcoran employees, and giving the names of the officers who had been elected and the names of the Labor Relations Board. (R. 2427; 2609).

On January 11, 1939, the Association wrote the Regional office of the Board at Los Angeles, advising that the Association understood the A. F. of L. was pretending to represent the employees of the Boswell Company, but that more than 95% of the employees were members of the Association, which was organized November 28, 1938, under the National Labor Relations Act with a constitution and by-laws which the Board was invited to inspect, and stating that the Association wanted no interference on the part of the A. F. of L; that its members were of the unanimous opinion that their purposes could best be served through the local organization without outside interference. (R. 2435). However, the Association received no response to this letter.

The officers and committeemen elected at the organizational meeting of November 28, 1938 held office until the regular annual meeting of the Association was held on April 5, 1939 (R. 2415). At this annual meeting the following officers were elected: Bill Willoughby, the shopkeeper, was elected president; Bill Nichols, a carpenter who works for hourly wages, was elected vice president; (R. 2415, 2416). Mr. McKeever, who does experimental work in the raising of crops, was elected secretary (R. 2417), and Samuel Brenes, one of the bookkeepers in the Company's office, was re-elected as treasurer. (R. 2417). An entirely new labor relations committee was elected. The men elect-

ed to this committee were William Overstreet, who worked in the gin at the Tipton plant; Bruce Clark, who was an electrician at the Corcoran plant, and Sam Robinson, who worked at the gins during the ginning season and did miscellaneous work around the plant during the slack season and who was paid on an hourly basis (R. 2417, 2418).

On April 15, 1939 the Association wrote the Boswell Company a letter (R. 2445) reading as follows:

"April 15, 1939

"J. G. Boswell Company

"Los Angeles,

"California

"Gentlemen:

"At the annual meeting of the J. G. Boswell Company Employees' Association on April 5, 1939, the question was raised from the floor regarding the unemployment of the Association members and a motion was made requesting the governing board of the Association to notify company officials of both Corcoran and Tipton that the Association is keeping a list of unemployed members, with their qualifications, and requesting the management to get in touch with the Association when new men are needed.

"At a meeting of the governing board of the Association on April 13, 1939, the secretary was directed to perform this duty, which is accomplished herewith. I do, however, wish to emphasize the fact that this is merely a request. We are not agitating for a closed shop but we do want to do everything reasonable and just to keep our members employed.

"Very truly yours,

" H. G. McKEEVER,

"Copy to Mr. Louis T. Robinson, Corcoran, and
"copy to Mr. Leon Jones, Tipton."

No demand was ever made by the Association for a closed shop and there was no evidence of any response from the Boswell Company to either of the letters sent by the Association. So far as shown by the record, the above mentioned letter of April 15, 1939, was the last activity on the part of the Association prior to the date of the hearing in this case.

The record discloses no activities of any kind on the part of the Association upon the property of the Boswell Company, except the gathering of a group of employees in the lobby of the administration building on the evening of November 18th, which meeting, as above mentioned, was held merely for the purpose of showing that the employees were satisfied with working conditions at the plant and also for the purpose of discussing the possibility of organizing their own independent union.

The finding and conclusion of the Board that the Boswell Company dominated and interfered with the formation and administration of the Association and contributed financial and other support to it and thereby violated Section 7 of the Act (R. 580) is based primarily upon the following facts or alleged facts: (1) That a number of alleged supervisory employees, as well as a number of other persons alleged to be closely allied with the management became members of the Association; (2) The claim that the Boswell Company was openly hostile toward the Federal and that the Association was promoted and organized solely for the

purpose of combatting the Federal; (3) That the Association never requested exclusive recognition, never sought to bargain with the Company, and never sought to secure a collective agreement; and (4) The claim that the Boswell Company permitted notices of Association meetings to be circulated in the plant during working hours and acquiesced in the activities of the Association promoters on Company time and property.

We submit that these findings and conclusions on the part of the Board and the alleged facts upon which the same are based are not only unsupported by the evidence, but are contrary thereto.

As hereinabove pointed out, none of the employees who became members of the Association had any authority whatever to in any manner speak for or represent the Boswell Company with respect to wages, hours or working conditions. In fact the Constitution of the Association provided that no employees exercising executive authority in the Company were eligible for membership. An executive was defined to be one who in his discretion makes decisions in the management of the Company or disputes over labor, wages, rates of pay, hours of employment or conditions of work arising between the employees of the Company and the Company (R. 2376; Const. Art. 111, Sec. 1).

The statements alleged to have been made by the alleged supervisory employees with respect to the Association as well as those with respect to the Federal were all heresay testimony introduced over the objections of respondents and were not supported by any credible or substantial evidence, and if, in fact, any such state-

ments were made, the same were not authorized, sanctioned or approved by the Boswell Company. So far as shown by the record all of the alleged supervisory employees, with the exception of Julius Hammond, were still working at the plant at the time of the hearing in this case and were available to the Board as witnesses had the Board desired to use them in an endeavor to produce direct, first hand testimony with respect to the statements alleged to have been made by the alleged supervisory employees. However, the Board did not see fit to call any of these alleged supervisory employees as witnesses and elected to rest its case almost entirely upon unsubstantial, uncorroborated, hearsay testimony.

We can find nothing in the National Labor Relations Act which prohibits supervisory employees from belonging to any labor organization. On the contrary, the Act specifically provides (Section 2, Sub. 3) that "the term 'employee' shall include any employee." Consequently the J. G. Boswell Company was not in a position, even though it had so desired, to prevent any of its employees from joining the Association, or any other labor organization they saw fit, and had it prevented or endeavored to prevent them from so doing, it would clearly have thereby violated the Act.

As heretofore pointed out in considerable detail, the evidence shows conclusively that the Boswell Company was not hostile to the Federal, either openly or otherwise, but on the contrary it cooperated with the Federal and adopted a number of suggestions made by the representatives of the Federal with respect to

working hours at the plant and never at any time refused to meet with the officers or representatives of the Federal or to discuss with them any of the matters which they desired to take up with the maangement. The undisputed evidence shows that the only time the officials of the Company refused to cooperate with the Federal was when the representatives of the Federal demanded that the Federal members who had left work on the morning of November 18th be reinstated in a body. The reason for such refusal was solely that at the time these demands were made, there was not sufficient work available at the plant for all of these men. The offer of the Company to give certain of these men employment from time to time as work was available was absolutely rejected by Prior as representative of the Federal.

The Boswell Company certainly cannot be charged with any violation of the Act merely because the Association failed and neglected to demand a working agreement between the Company and the Association or to request exclusive recognition. The Association did endeavor to some extent to bargain with the Company by writing the Company the letter of April 15, 1939 in which it requested the management to get in touch with the Association when new men were needed. Obviously, however, the Boswell Company was not in a position to control or insist upon any acts, either of omission or commission on the part of the Association, and had it insisted or even attempted to insist that the Association take more affirmative action in representing its members in connection with their relationship

with and employment by the Company, the Company might have found itself in the position of having to defend an unfair labor charge brought against it by the Association.

It should be borne in mind that the Association was not organized until November 28, 1938, and had been in existence for a period of less than six months prior to the date of the hearing in this case.

It should also be borne in mind that the Association was not organized until November 28, 1938, at which time the ginning season was rapidly drawing to a close, and there was a very substantial decrease in the amount of employment which was available. The undisputed and stipulated evidence shows that the oil mill had previously closed on November 15th; that only 4 of the 6 gins at the plant operated at all during the 1938-39 season, and then only with one shift of men per day; that one of these 4 gins had already ceased operations for the season on November 25th; that another of the gins closed for the season on December 3, 1938; that another of the gins practically ceased operations on December 5, 1938, and ran only part time thereafter until December 30, 1938, not operating at all some days and on others operating only for a few hours, and that the fourth gin, although it continued operating until January 24, 1939, operated only part time because of lack of cotton.

The evidence also shows that as the gins closed down and wound up the season's work there was little or no employment left for any of the men. It is clear that by the time the Association was in a position to

function, or in any event within a short time thereafter, the slack season of employment had arrived and there were few or no jobs available for which the Association could bargain with the Company. This condition still existed at the time of the hearing in this case. This is another factor which demonstrates conclusively that the Board's contention that the Association's alleged complete inactivity as a bargaining agency constitutes well recognized indicia and forms of company domination and support is wholly without any foundation.

Previous to the time that Louis Robinson wrote his letter of November 18, 1938, to the head office of the Company in Los Angeles he was aware of the anti-union demonstration that had taken place at the plant that morning, although he was not familiar with many of the details thereof, and he knew the non-union men, who apparently comprised the great majority of the employees, were considering the matter of ~~properly~~ forming their own organization, and he undoubtedly realized that if an independent union was organized it would be only a question of time until he, as an official of the Company, would be faced with the necessity of taking some position with respect thereto. Consequently he advised the head office regarding the events of that day and requested information regarding so-called "company" unions. (R. 2601-2603).

He testified that his purpose in writing the letter of November 18, 1938, in which he reported this matter was to call the attention of Colonel Boswell, the president of the Company, to the fact that the em-

ployees might form an Association and the Company might be called upon to recognize it, and he thought Mr. Boswell should be giving the matter some thought. (R. 2622, 2623). He further testified that in writing this letter he was merely reporting to the head office information obtained earlier in the day from the employees committee, and that his purpose in requesting Mr. Boswell to obtain any information he could regarding company unions was that he (Mr. Robinson) did not know anything about such unions and did not know what decisions the Company might be called upon to make and thought they should post themselves in advance of any action being taken by the Association if and when organized. (R. 2623, 2624).

The Board in its purported decision, as well as in its brief, emphasizes the fact that the non-union employees who first came to Mr. Robinson for advice following the incidents of the morning of November 18, 1938, and who later consulted with the District Attorney of Kings County when Mr. Robinson refused to advise them, were not docked in their pay for the time taken off from their work that day. It is contended by the Board that this was an act of favoritism toward the non-union employees who later formed their own organization, and is in contrast with the alleged hostility of the Company toward the Federal. This contention on the part of the Board is clearly without any foundation in, and is not supported by, the evidence, as the testimony of the complaining Federal members showed conclusively that they carried on their organizational activities while on the job, and although this fact was

known to the Company, it made no objection thereto. For instance, Andrade testified that he approached a number of the employees during working hours at the plant; that he did not ask them not to tell anybody that he was signing them up, and that he simply looked on that as one of his rights (R. 1722).

When Prior called on Gordon Hammond in the forenoon of November 17, 1938 for the purpose of endeavoring to work out a program for reducing the hours in the gins and spreading what little work was left to be done at the plant during the remainder of the season, Mr. Hammond went out to the gins where they were then working and had Farr, Spear and Martin come to the office and attend the conference, taking them away from their work (R. 1053, 1054). There was no evidence that any deduction was made from their wages for the time they were away from the job while attending this conference and discussing matters which the Federal desired to take up with Gordon Hammond.

The evidence also shows that during the early part of October Spear, Martin and Farr met with Gordon Hammond as a committee representing the Federal and discussed the matter of attempting to work out a schedule for the mill and gins which would keep the men from being laid off. There was no evidence, however, that their pay was docked for the time they spent away from their jobs while discussing this matter.

It is clear from all the evidence that the Boswell

Company in an endeavor to preserve its neutral position and to avoid any possible violation of the National Labor Relations Act did not display any favoritism toward either the Federal members or the Association members and accorded both groups equal opportunity so far as carrying on their respective organizational activities at the plant was concerned.

It is contended by the Board in their brief that the officers of the Association, and particularly the men who were elected to the labor relations committee of the Association, did not represent the rank and file of the membership. The Board, however, entirely ignores the fact, as shown by the undisputed evidence, that a new governing board was elected at the regular annual election held April 5, 1939, and at said time a new labor relations committee was also elected as hereinabove mentioned. The evidence shows that shopkeeper Bill Willoughby was elected president and Bill Nichols, a carpenter employed on an hourly pay basis, was elected vice president. The members of the labor relations committee elected at that time were William Overstreet, who worked in the gin at Tipton; Bruce Clark, an electrician who was paid at an hourly rate; and Sam Robinson who was a ginner and odd job man and was also paid at an hourly rate. All of these men were from the rank and file and the only officers who could by any stretch of the imagination be classified as not being from the rank and file were McKeever, a farming adviser whose headquarters were at the office of the plant and who was elected secretary of the Association, and Brenes, one of

the bookkeepers at the plant, who was re-elected as treasurer.

The evidence also showed without dispute or contradiction that the Association had a number of committees—membership, social, nominating, and finance committees—in addition to the labor relations committee. (R. 2419), and there was no evidence that any of these various other committees did not function.

There was no evidence whatsoever of domination or interference with the Association by the Boswell Company. The Board places much emphasis upon the fact that certain employes which it terms supervisory employees joined the Association; however, as previously pointed out, the evidence is clear that no member of the Association had any authority to hire or fire or speak for the Company on questions of labor relations, and Manager Louis T. Robinson and Plant Superintendent Gordon Hammond were the only ones at the plant who had any such authority. There was absolutely no evidence whatever that any of the men who joined the Association, whether alleged supervisory employees or otherwise, were in anywise acting for the Boswell Company in joining the Association or in participating in its activities or that they or any of them joined the Association at the instigation of any official of the Company. There was no evidence that the Company or anyone connected with its management even suggested that it was in favor of the Association, and the conclusion of the Board that the Boswell Company was behind

the Association and promoted and encouraged the organization of the Association for the sole purpose of combating the Federal is wholly without any support in the evidence. The evidence shows on the contrary that the Association was the voluntary and independent creature of the great mass of the employees who did not wish to associate themselves with or pay tribute to an outside labor organization.

The Board in its purported Decision and Order infers that after November 18, 1938 the Boswell Company employed only employees who joined the Association. There is no evidence in the record which would in anywise or to any extent support this inference, and there was no showing of any kind that the Boswell Company, either before or after November 18, 1938, or at any other time, inquired into the union affiliations, if any, of any of its employees or made membership in the Association or any other labor organization a condition of employment. On the contrary the record shows without dispute, as elsewhere pointed out in this brief, that quite a number of men whom the evidence shows were members of the Federal continued to work at the plant subsequent to November 18th. Moreover the record does not contain any evidence showing either the names or number of all the men who continued to work at the plant after November 18, 1938, nor their affiliations, if any, with labor organizations, excepting insofar as it was developed incidentally that some of the men who worked at the plant after November 18th were members of the Federal, and others were members of

the Association.

It is impossible to determine exactly how many of the employees who continued to work at the plant after November 18, 1938 were members of the Federal as the Trial Examiner erroneously refused to permit counsel for respondents to elicit any testimony from the Board's witnesses with respect to the roster of Federal members; and the only evidence as to the names of the Federal members which got into the record in this respect was such evidence as the Board and the Trial Examiner saw fit to permit in the record.

When the Board called Br. Brenes, the treasurer of the Association, as a witness, the Trial Examiner asked him if he desired counsel, and he stated he did not. (R. 2401). It should be noted, however, that the Association was not made a party to this proceeding and did not intervene in the case.

Under the authority of **N. L. R. B. v. Sterling Electric Motors, 109 Fed. (2d) 194 (C. C. A. 9, 1940),** the Association not being a party to the proceeding and not having appeared therein at the hearing, could not be disestablished as recommended by the Trial Examiner in his Intermediate Report. The Board in its purported Decision and Order modified this recommendation on the part of the Trial Examiner, and held that since the Association had never been recognized by the Boswell Company as the representative of its employees for the purposes of collective bargaining, it was not necessary to order the disestablishment of the Association. (R. 614); and the Board ordered that the Company refuse to recognize the

Association as the representative of any of its employees for the purpose of dealing with said respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment and other conditions of employment. It seems to us there is no distinction between an order disestablishing the Association and the order as made by the Board. Certainly the effect in either case would be the same, and if the Board's order should be enforced by the Court same would result in absolutely nullifying the right of the Association's members to self-organization and to collective bargaining which is conferred upon every employee and group of employees under the Act. We submit that based upon the evidence and the law, the order as made by the Board in this regard is contrary to law.

The evidence in this case wholly fails to show any unfair labor practice under Section 8 (2) of the Act, and the failure of the evidence in this regard is shown by many cases, some of which are the following:

N. L. R. B. v. Swank Products, supra

Cupples Co. Manufacturers v. N. L R. B., supra

L. Greif & Bro. v. N. L. R. B., 108 Fed. (2d) 551, (C. C. A. 4, 1939)

Ballston-Stillwater Knitting Co. v. N. L. R. B., supra

In **N. L. R. B. v. Swank Products,** supra, there was evidence that Stevenson, an employee who had the authority to hire other employees under the direction of his superior, expressed himself in favor of an inside union at a meeting of employees. Six foremen were there, as well as the superintendent of pro-

duction of the employer. A committee was formed at that meeting, which committee consulted with the attorney for the employer, but that attorney refused to represent the committee. There was also evidence that during working hours the power had been shut off and a meeting of employees was held at the plant on company time. Stevenson and the foremen attended that meeting. Stevenson reported what occurred at that meeting to the vice-president. Thereafter solicitation for membership in the inside union was carried on in the plant without opposition from the management. There was evidence that the Independent collected dues but did not accumulate any strike fund. The Board ordered the employer to withraw recognition of the inside union and cease interfering with it. This order was set aside by the Circuit Court. The court stated, as follows (p. 874):

> "The Act does not purport to prohibit plant, or so-called 'company' unions, except where they are linked to the employer. That relationship does not arise from passive acquiescence of an employer, for acquiescence has none of the positive and agressive quality contemplated by such words as 'interfere', 'restrain', 'coerce', and 'dominate', which we find in the Act."

The court then stated that the evidence showed a genuine attempt on the part of the employees to form their own union to prevent what they considered to be a less advantageous external organization coming into the plant. As above pointed out, the court held that there was no showing of hostility by the management to the complaining union and there was no showing that the alleged statements by Stevenson and the fore-

men were made on behalf of the company, and held that the record did not sustain a finding of interference, domination or coercion.

In **Ballston-Stillwater Knitting Co. v. N. L. R. B.**, supra, there was considerable evidence of activity upon the part of alleged supervisory employees. The court set aside an order of the Board based upon a finding that the employer had dominated and interfered with the formation of an employees' association, and the court stated as follows (p. 761):

> "The testimony is uncontradicted that the officers of the petitioner had no hand in establishing the Association. It is true, as the Board found, that the chief reason for its formation was to keep out the CIO, but the plan of an 'inside' union was apparently the spontaneous reaction of a group of the employees, who circulated their petitions, got up their own meetings, engaged their own attorney to draft the constitution and by-laws, and paid their expenses, without suggestion or help by the petitioner. Concededly the petitioner made no financial contributions. It is true that the petitions for membership were circulated in the mills without protest by the management, and that employees who attended the April 9th meeting during working hours were not docked in pay. But it is also true that solicitation of members for the CIO occurred, as Ingersoll testified, during working hours . . . . Nor is the fact that employees who attended the April 9th meeting were not docked in pay sufficient evidence of domination or interference. There was no discrimination between those who favored the 'inside 'union and those who favored the CIO. No one was docked, because, as the superintendent explained, he thought that if he was liberal and did not interfere with meetings the trouble would blow over."

The court also stated at page 762:

"There is not the slightest evidence in addition to the conduct of these 'supervisory' employees that the petitioner initiated the movement for an unaffiliated union. The most that can be inferred is that superintendent Hathorn knew that 'supervisory employees' were circulating membership cards for the Association during working hours, and that he took no step to prevent it. As **a matter of law, in our opinion, this does not amount to domination or interference by the employer.** There is no evidence that Hathorn would not have been equally lenient with regard to the circulation of petitions for membership in the CIO. Some solicitation for CIO members was done in the mills, although apparently less openly and to a less extent. No request was made for leave to circulate them openly and no demand that the circulation of Association cards be stopped. **To constitute domination or interference by the employer we think that it must appear that the employees are acting for him rather than for themselves, or that the employer in some manner gives aid to one group which he withholds from the other, or discriminates in favor of members of a labor organization or against non-members.** A union limited to the employees of a single employer is as legal as any other, and we know of no rule of law that forbids the employer to permit his employees to solicit memberships during working hours, provided he does not withhold a like privilege from the opposition and exerts no pressure upon employees to join the union."

(Emphasis ours)

In **Cupples Co. Manufacturers v. N. L. R. B.**, supra, the evidence showed the solicitation of membership in an inside union by employees who had authority to recommend the hiring and firing of other employees. Many anti-union statements were alleged to have been

made by these employees. The court set aside a Board order directing the employer to refrain from dealing with the inside union and disestablishing it. This case has been discussed above, but in considering this particular phase of the case the court stated (p. 115).

> "We think that the doctrine of respondeat superior can not, under the circumstances disclosed by the evidence in this case, be invoked by the Board to justify its finding that the Company dominated, interfered with and supported the formation or administration of the Association. As already pointed out, Miss Weitzel, in encouraging and attempting to influence members of the force with whom she was associated to join the Association, was engaged in the performance of no duty for the Company, was acting outside of the scope of her employment, and can hardly be said to have been furthering the business of her employer, even though she may have believed that she was doing so."

The court further stated (p. 116):

> "It is our opinion that it was incumbent upon the Board, in order to sustain the charge that the Company had domianted, interfered with, and supported the formation and administration of the Mutual Relations Association, to prove, by a fair preponderance of the evidence, that the Company had, through its officers, its executives, or its authorized agents, committed acts amounting to domination, interference or support, or that it had aided, abetted, counseled, commanded, induced or procured the commission of such acts. In other words, we think that it was necessary for the Board to prove not only that acts amounting to interference with or domination or support of the independent union were committed, but also that with respect to the commission of such acts the Company virtually stood in the relation of either a principal

or an accessory. We are also of the opinion that no doctrine of imputed liability can be invoked by the Board in this case to bridge the hiatus in its proof."

See also: **Humble Oil & Refining Co. v. N. L. R. B.,** 113 F. (2d) 85, 92, (C. C.A. 5, 1940); **Continental Box Company v. N. L. R. B.,** 113 F. (2d) 93, 96, (C. C. A. 5, 1940); **Foote Bros. Gear & Machine Corp. v. N. L. R. B.,** 114 F. (2d) 611, 619, (C. C. A. 7, 1940); **Virginia Electric & Power Co. v. N. L. R. B.,** 115 F. (2d) 414, (C. C. A. 4, 1940: reversed and remanded 62 S. Ct. 344); **E. I. du Pont de Nemours & Co. v. N. L. R. B.,** 116 F. (2d) 388, (C. C. A. 4, 1940); **N. L. R. B. v. Sparks-Withington Co.,** 119 F. (2d) 78, 82, (C. C. A. 6, 1941); **Diamond T Motor Car Co. v. N. L. R. B.,** 119 F (2d) 978, 982, (C. C. A. 7, 1941); **Southern Ass'n Bell Tel. Employees v. N. L. R. B.; Southern Bell Tel. & Tel. Co. v. N. L. R. B.,** 129 F. (2d) 410, (C. C. A. 5, 1942).

G. THE FINDINGS OF THE BOARD ARE NOT BASED UPON SUBSTANTIAL EVIDENCE

The Board's findings and purported decision and order with respect to the Boswell Company are based almost entirely upon unsubstantial hearsay testimony which was erroneously admitted by the Trial Examiner over the objections of respondents. The Board cast aside and ignored almost entirely the direct competent and credible testimony of Louis T. Robinson and Gordon Hammond who, as shown by the undisputed evidence, were the only ones at the Corcoran plant who had any authority to employ or discharge any

employees and were the only ones who were authorized to speak for the Company with respect to any employment matters or with respect to any matters concerning its business, or who had any authority at all to bind the Company in any way or to any extent.

The Board, on the other hand, adopted and followed almost in its entirety the hearsay, and in many instances incredible, testimony of the complaining members of the Federal; particularly with respect to the alleged conversations between the witnesses and the alleged supervisory employees, and in a few instances, conversations with Gordon Hammond, which were emphatically denied by him.

The character of the testimony given by the complaining members of the Federal is clearly reflected and shown in the record; however, we will call attention to some of the most glaring inconsistencies in their testimony, their lack of credibility, and the general incompetency of their testimony, and also to a number of instances in which the testimony of some of these witnesses was impeached and discredited.

Martin was one of the principal witnesses for the Board. The complete unreliability of his entire testimony is demonstrated by the inconsistent and conflicting statements, some of which are as follows:

When questioned concerning the union meeting which was held the night of November 16, 1938, Martin testified there were some 18 or 20 persons present at said meeting, but he could name only nine of them, notwithstanding the fact that he was secretary of the union and had kept minutes of the meeting (R. 1235,

1236). Among the nine persons present who were named by him was E. C. Ely (R. 1235). When Martin was testifying later in the hearing, in connection with the Board's alleged case against the Associated Farmers, and was asked if E. C. Ely was present at said meeting of November 16, he first testified as follows:

"A. I don't remember about that meeting, whether he was or was not.

Q. Would you say he wasn't there?

A. He wasn't there during the meeting, I know.

Q. Well, would you say that he wasn't there sometime during the gathering.

A. No, wouldn't say he wasn't". (R. 2236).

The evidence shows without dispute that on November 17, Prior and the union Committee consisting of Spear, Farr and Martin met with Gordon Hammond (R. 862), and Prior testified that he reported the result of this meeting to a union meeting which was held on the night of November 17, 1938 (R. 1165). However, when Martin was asked upon cross examination if a union meeting was held on the night of November 17, 1938, he testified he did not remember whether or not such a meeting was held (R. 1237).

On cross examination, Martin testified that when he went to Colorado, after having worked for the Boswell Company, about 2 weeks in March 1938, he came back to Corcoran and went to work about May 17, 1938. When asked if the oil mill had started before he got back, he testified that it was not running when he got there and hadn't been for some time before (R.

1227). However, the undisputed and stipulated evidence shows that the mill was running May 17, 1938 and closed down that day and re-opened again July 1, 1938 (R. 3006, 3007).

E. C. (Eugene Clark) Ely, who was called as a witness by the Board, testified that he first went to a union meeting during January, 1939 (R. 1933), but testified that he had been in the same house where union meetings were held before that time. When he was asked on what occasions he had been in the same house where union meetings were held he testified positively that he had never been to a gathering of union members before January, 1939 (R. 1933, 1934).

However, Griffin, who also testified as a witness for the Board, testified that E. C. (Fat) Ely attended a regular union meeting on November 15th or 16th, 1938 (R. 1909, 1910), and Martin likewise testified that E. C. Ely was present at the union meeting on November 16, 1938 (R. 1235).

When Griffin's testimony was called to E. C. Ely's attention later in the hearing he admitted that as early as November 16, 1938, he had attended social gatherings of union members (R. 2361-2363) and testified that Griffin may have thought he was a member because he went around with union men (R. 2361).

L. E. (Elgin) Ely, who is a brother of Eugene Clark Ely and Boyd Ely (R. 1934) also testified as a witness for the Board. The complaint (paragraph 10 thereof) (R. 16) contained an allegation that his pay was reduced because of his union activities. The trial examiner found that this allegation was not sustained

by the proof, but the testimony of Ely in that regard is material in considering his credibility.

Ely testified, positively, that he received 40c per hour when he was re-employed in October, 1938 (R. 1777, 1778), that he worked for five days as press helper and then substituted for a sick pressman for two weeks (R. 1778), and that he received 40c per hour as pressman (R. 1803). He stated that he then resumed his job as press helper and he testified that during the week of November 12, 1938 his pay was reduced to 35c per hour, that he discovered that fact when he received his pay check for that week, and that he received only one check at the rate of 35c per hour (R. 1778, 1779, 1812, 1803).

Even when Ely was shown his time cards he insisted that he was receiving 40c per hour when he first went back to work (R. 1806), and that he knew how much he was paid (R. 1806). He said he kept a record of his time and handed it to Gordon Hammon (R. 1807) and that his check for the last week he worked was not based upon the 35c per hour basis.

Also he insisted that he left work on November 14, 1938. Even when he was shown his time cards (R. 1805, 1806), he denied working November 15th or 16th (R. 1813, 1814).

The testimony of Gordon Hammond (R. 2964-2980) and the records (Boswell's Exhibits 9 (a) to 9 (d), inclusive, R. 2971-2979), showed conclusively that Ely started work on October 24, that he worked one day as press helper and was paid 35c per hour, that he worked seven days as pressman and received 40c per

hour, after which he resumed his job as press helper on November 3rd and was again paid 35c per hour for that day and for the two following weeks. The trial examiner found substantially in accordance with these facts. Gordon Hammond's testimony and the records also show conclusively that Ely worked up until November 16, 1938 with only two hours credited to him on November 16, because that is the day he left as a result of an injured thumb.

Boyd Ely, when called as witness for the Board, testified in considerable detail, despite the repeated objections of the respondents, to certain conversations which he claimed were had in July 1938 with Tom Hammond and certain other employees, in which certain discriminatory remarks with respect to the union were alleged to have been made.

He was asked on cross examination if he attended the union meeting on November 19, 1938, at which the boycott was declared against the Company, and stated 'I think I did.' He admitted that he had been taking part in the boycott and had also been on the picket line (R. 1763). When asked to state what was said and done at the meeting at which the boycott was declared, he could not remember. (R. 1766, 1767).

Griffin, who was also a Board witness, and who testified over the objections of respondents to certain alleged conversations with Tom Hammond in November, 1938, during the course of which certain discriminatory remarks were alleged to have been made by Tom Hammond, testified positively, both on direct and cross-examination, that he worked continuously from

the time he was employed in August, 1938, until November 17, 1938 (R. 1862, 1895). He also testified positively that he was not laid off at any time after the first week in August, 1938, until November 17, 1938 (R. 1895). He was shown Board's Exhibit No. 3 (R. 790) which consisted of the Social Security records kept by the Boswell Company for all employees, and which records showed the period during which employees worked and the amount of pay they received. Counsel for the Board during the hearing had previously made the statement for the record that the Board had not attempted to contest the accuracy of the records contained in Board's Exhibit No. 3 (R. 1559, 1560). Griffin's Social Security record showed that no wage payments were made to him between the week ending August 11, 1938, and the week ending October 13, 1938. After being shown this record he was asked if he was not laid off from August 11, 1938, until on or about October 7, 1938 (R. 1895). Despite this incontrovertible evidence, he testified he thought there was a mistake in the books (R. 1897), and, so far as he could remember, he worked continuously during this period of time, and that during said period of time he was sewing cotton seed cake and cleaning up around the gin, and feeding suction, and hauling cotton seed into the warehouse. He also testified positively that he was paid continuously at the rate of forty cents per hour during the period from August, 1938, on through to November 17, 1938, and that he worked ten or eleven hours each day during that time. (R. 1897, 1898).

He also testified positively that he was not even

laid off several days at a time during that period (R. 1906) and that he did not receive any checks for a week's work as low as $24.80.

In addition to the record contained in Board's Exhibit No. 3, Gordon Hammond, the plant superintendent employed by the Boswell Company, identified and explained Griffin's time cards for the period above mentioned and explained in detail the nature of the work done by him and demonstrated conclusively that the records contained in Board's Exhibit No. 3 were correct (R. 2985-2996) Gordon Hammond's testimony and the time cards (R. 2981-2984; Boswell's Exhibits Nos. 22 (a) to 22 (g), inclusive) showed that Griffin worked only two days during the week ending August 5, 1938, and that he was paid at the rate of 35c per hour during that week. The records and testimony further conclusively show that Griffin was not again employed by the Boswell Company from that time until the week ending October 13, 1938 (R. 2986).

Griffin was asked if during his last week of work at the plant, that is, the week ending November 17, 1938, his work did not consist chiefly of hauling planting seed, and he testified that it did not, that his work consisted chiefly of sewing planting seed (R. 1898). He was also asked if there was some work done by him during that week which consisted merely of cleaning up around the plant, and he testified he didn't know as there was that week. He was also asked if he knew how many hours a day he worked during his last week of employment, and he testified he was sure it was around 12 hours a day (R. 1899). The foregoing testi-

mony was directly contrary to his time card for the week ending November 17, 1938 (Boswell's Exhibit No. 22 (G), R. 2984), which showed, first, that the principal work performed by him during said week was hauling planting seed, and that he did not do any work of sewing planting seed during said week; and, second, that during part of three days during said week he was engaged in clean-up work around the yard; and third, that there was only one day during said week in which he worked 12 hours, and the rest of the time during said week he worked only from 4 to 11 hours a day, which fact showed conclusively that the work on which he was engaged was running out.

When Griffin was asked by Board's counsel whether he became a member of any labor organization, he could not remember either the name or the number of Prior's local Union, of which he became a member (R. 1864).

The foregoing instances are illustrative of the complete unreliability and lack of credibility of Griffin's entire testimony.

Johnston, who was also called as a witness by the Board, testified at the hearing that he had never talked over the matters to which he testified with any members of the union before getting on the stand and that he had not discussed the case with anyone whomsoever before testifying (R. 2195-2198).

Frank A. Mouritsen, Attorney for the Board, was later called by the respondents as a witness and he testified that he had a signed statement by Mr. Johnston, which was taken by someone on the staff, prior

to the time Johnston testified, and that he would say before Johnston testified he had discussed the case with him because that was his invariable practice.

Johnston also testified, in answer to a direct question, that he was not employed. In this regard, Mr. Mouritsen stated in his testimony that he had called Mr. Johnston out of order so that he could take employment elsewhere and that Johnston left after he testified and he thought he was employed in Hanford (R. 2798, 2799). Mr. Mouritsen later explained his answer and stated that he let Johnston go for the purpose of taking up employment, but he did not know whether Johnston was employed when he was testifying.

H. N. Wingo, when called as a witness by the Board, testified regarding certain alleged conversations with Joe Hammond, during the course of which Joe Hammond was alleged to have made certain derrogatory remarks regarding the union. He also testified as to the periods of his employment and the nature of the work done by him. He further testified regarding the events of November 18, 1938. Upon direct examination he testified that he worked around the plant in Corcoran hoeing weeds and cleaning up for a few days in April, 1938, and that he was then laid off at the plant and got a job as pumper in the 749 District (R. 1613).

Upon cross-examination Wingo was shown his Social Security record, (Board's Exhibit No. 3, R. 784), which showed conclusively that he was not on the payroll between the week ending March 24, 1938, and

the week commencing about July 1, 1938. He admitted that he was laid off by the Boswell Company about March 24, 1938 (R. 1628), but insisted, notwithstanding the record, that he went back and worked a few days after the mill shut down the latter part of March (R. 1629), and that after the mill shut down he was only off two or three days until he was employed for a short time, and then laid off again, and that he helped set pumps and hoed weeds around the warehouse during these few days.

The lack of memory of this witness is shown by the fact that both on direct and cross-examination he testified that he made application to join the Union on September 2, 1938. However, he did not remember what union meetings were held, except he stated he attended one about November 16. He did not remember if this was the first meeting he attended, and did not even remember the date he was initiated (R. 1635, 1636). Neither did he remember when he received his union button, nor how many other employees of the Boswell Company were present at the union meeting which he did attend (R. 1636).

Gilmore, who was called as a witness by the Board and whose alleged grievances against the Boswell Company were apparently the basis of Prior's first charge against the Company which was filed with the Board on July 17, 1938, testified that he engaged in union activities; that the first thing he did was try to organize a union in the spring of 1938 before he was laid off; and that he talked with the majority of the boys about the union even when he was working there.

He also testified to a number of alleged conversations with Gordon Hammond in June and July, 1938, during the course of which he claimed the union was discussed and all of which conversations were denied by Gordon Hammond. Gilmore further testified that sometime after July 4, 1930, he left the employment of the Boswell Company because there was nothing to do and he worked at various jobs around San Jose and Monterey. At one time during his testimony he stated that he went to Salinas during that time and worked in the fruit and vegetables, (R. 1848). Later he denied that he went to Salinas or worked in the fruit and vegetables (R. 1849). He then stated that during the time mentioned he worked at San Jose in cold storage and at Monterey in fruit canneries and that he also worked on the highway (R. 1849). He later stated that during that same time he worked in San Jose and also in the fish cannery at Monterey (R. 1851, 1852). At any rate he didn't return to work for the Boswell Company until September, 1931 (R. 1849).

He first testified that when he went back to work in 1931 he worked in the lint room until 1936 (R. 1833). Later he testified that when he returned to work in 1931 he helped put up the oil mill which had burned down (R. 1849), and later that he worked at odd jobs such as grinding barley (R. 1850). He stated that since 1936 he worked in the seed house but when the mill was not running he would cut weeds, do painting and odd jobs (R. 1833, 1834).

He first testified that he worked practically all of the time from 1931 to 1938 (R. 1832, 1834). He later

admitted on cross examination that in that period during the depression he was laid off and that even Gordon Hammond, the plant manager, went out and ran a ranch (R. 1850). Also he admitted that he was laid off a few weeks in 1937, during which time he took a trip to Oregon (R. 1852), and that he was laid off about three weeks in 1936 (R. 1850).

Gilmore's testimony throughout was contradictory and unreliable and is entitled to little or no weight, especially is this the case insofar as his testimony relating to union activities is concerned. In this regard Gilmore testified that the first thing he started to do was to try to organize a union. He said he could not place the date or the month but that he started some time in the spring of 1938 (R. 1834). In answer to the following question by counsel for the Board, "that was before you were laid off?", he answered, "Yes" (R. 1835). Later he testified that he started talking about the union in January (R. 1835). He said that he talked with a majority of the boys about the union when he was working there, that after he was laid off he was down to the plant sometimes two or three times a week all through the summer and even after the union was started he kept talking to the boys. He stated that he never did sign any of them up but that he asked them to come to meetings (R. 1836). He testified that he joined the union but that he couldn't remember the date, except that it was some time in the summer of 1938 (R. 1843).

The record shows that in spite of this alleged activity and his invitations to others to come to the meet-

ings and the fact that he also joined the union and purported to be one of the early union organizers at the Boswell plant, he was not mentioned by any of the witnesses as having been present at any of the meetings. The evidence shows that he did not apply as a charter member of the union and did not sign anyone up in the union.

Farr was also one of the principal Board witnesses and over the objections of respondents was permitted to testify to a number of conversations with alleged supervisory employees, particularly Joe Hammond and Tom Hammond, in which they were alleged to have made certain discriminatory remarks respecting the union. He was also permitted to testify, over the objections of the respondents, to the incidents of November 18, 1938. The Board in its findings adopted practically all of his testimony as true. However, his testimony was thoroughly impeached as shown by the following instances:

Farr testified he worked in the oil mill as a linterman from January 1938 until the end of the seed crushing season in September 1938 (R. 984), whereas the undisputed and stipulated evidence shows that during the period of time he claims he was working at the mill, the mill was in fact closed for a total of about two and one-half months during such time.

Farr claimed that he complained to Gordon Hammond on different occasions that the working hours at the Boswell plant were too long (R. 986, 1032), but reluctantly admitted upon cross examination that during the four months period that he worked for the

San Joaquin Cotton Oil Company at Bakersfield in the summer and fall of 1937, he worked the same hours per day and received approximately the same amount of pay that he had been working and receiving while employed by the Boswell Company (R. 1026).

On direct examination he remembered and testified in detail to alleged conversations and other matters concerning which he was examined. However, upon cross-examination, his answers were evasive and showed lack of observation and memory.

Farr testified that he worked in the gins and elsewhere about the plant both in 1937 and 1938. The undisputed and stipulated evidence showed that considerably over four times as much cotton was handled and processed at the plant in 1937 as in 1938, and that more than twice as many men were employed in the ginning season 1937 as in the ginning season of 1938. In spite of these facts, Farr testified as follows:

"Q. . . . did you notice any difference between the two seasons, so far as the volume of cotton in the Boswell Plant?

A. I don't know as I paid any attention to it. I had all I could do both times." (R. 1021).

He was also asked the following questions and gave the following answers:

Q. Did you notice any difference in the number of men employed at the Boswell Company during the two seasons, that is, as between the '37 and '38 season and the '38-'39 season?

A. No, sir, I didn't have any way of knowing the employment of both sides.

Q. I am just asking you for your observation as to the number of men around the plant.

Did it impress you that there were more men during one season than during the other?

A. There were men working last year that never had worked before."

When this last answer was stricken as not responsive, he testified as follows:

"THE WITNESS: I couldn't say.

Q. (By Mr. Clark) In other words, so far as you are concerned, you cannot tell us?

A. I couldn't tell you.

Q. Whether or not you noticed that there were more men in one season than in the other, is that true?

A. I couldn't say for I don't know." (R. 1021).

On cross-examination Farr at first testified that up to the time of one of his alleged conversations with Gordon Hammond in July or August 1938, he had not told anybody he was attempting to organize the American Federation of Labor Union at the Boswell plant at Corcoran and hadn't been attempting to organize (R. 1047). Later, on cross-examination, however, he was obliged to and did admit that as early as March 1938 he met with Prior (R. 1047); that he also met with Prior again in July, and delivered the list of names of employees furnished by Gilmore (R. 1048). He was asked if he had any meeting with Prior at his house from July clear on until September 2, and replied "I can't remember of it. I can't testify to that,

for I don't remember of anything up until about that time." (R. 1049).

When asked on cross-examination concerning statements made by various persons present at the meeting which was held November 17, 1938, betweeen Prior, Spear, Martin and Farr, and Gordon Hammond, Farr could remember practically none of the statements which Prior had previously testified were made by various parties at this meeting (R. 1059-1061).

Powell was also one of the complaining union men who was called as a witness in this case. The Board's purported decision and order was based to a considerable extent upon the testimony of Powell, particularly his testimony regarding an alleged conversation with Gordon Hammond which was supposed to have been had some time after Powell left the plant on the morning of November 18th, 1938, and in which conversation he claimed that Gordon Hammond told him he could return to work provided he would surrender his membership in the Federal (R. 546). The Board as well as the trial examiner found that Powell's entire testimony was substantially worthy of credence (R. 530). However as shown by the record there never was a witness whose testimony was more thoroughly discredited and impeached than was the testimony given by Powell in this case.

A large part of Powell's testimony was devoted to his alleged spying upon the Federal and his alleged reporting thereon to Gordon Hammond. He testified upon direct examination that about November 6, 1938, Gordon Hammond asked him to attend

meetings of the Federal and find out who their leaders were, and that he could have a job as long as he wanted, provided he did not have anything to do with the Union (R. 1261). He claimed that after that he attended Union meetings and reported to Gordon Hammond who the officers were and who was present (R. 1264), and that he continued to spy upon the Union and report to Gordon Hammond every day or so between November 1st and 16th, 1938 (R. 1398). Powell's testimony regarding these spying activities was so palpably false and improbable, particularly in view of the fact that Gordon Hammond was already cognizant of the fact that a Union was being organized at the plant, having been first informed by Prior on September 2, 1938, and again on October 8, 1938, and having also been informed thereof by the Union committee, consisting of Spear, Martin and Farr, who met with him in the early part of October, 1938, all of which had occurred some time before the alleged spying arrangement was made, that even the Trial Examiner did not place any reliance on this part of Powell's testimony and did not even make a finding thereon in the Intermediate Report. However, both the Trial Examiner and the Board accepted as the gospel truth the portion of Powell's testimony which related to an alleged conversation with Gordon Hammond some time after November 28, 1938, saying that his testimony was substantially worthy of credence, despite the fact that Powell was thoroughly discredited and impeached and the alleged statements were categorically denied by Gordon Ham-

mond (R. 3037-3040). Gordon Hammond testified on the other hand that about the later part of November, 1938, Powell came to the company's office and wanted someone to write the workmen's compensation insurance company regarding an injury which had previously been sustained to his finger. At that time Gordon Hammond asked Powell if they (referring to the Federal members) or he were coming back to work. Powell replied that they would not let him. Gordon Hammond asked him who, and he said "Mr. Prior" (R. 3040).

The evidence affirmatively shows that Powell was engaged principally in the performance of seasonal work and odd jobs. His testimony shows that he originally came from Georgia to California in 1921 and lived in California off and on after that (R. 1297, 1298); that prior to the time that he first went to work for the respondent Boswell Company in August 1936 he had been in Georgia and had not been employed for about two years (R. 1298, 1304). When he first started to work for the Company in August 1936 he did odd jobs until about September 1936 (R. 1305). Then he worked in the gins until the ginning season ended in January or February 1937 (R. 1306). He was then put to work in the power plant where he oiled and wiped machines and kept things spick and span. He continued on that job until sometime in August 1937 (R. 1306). He then took a couple weeks vacation, but was laid off immediately after he returned (R. 1307). A few days later he was given a job digging ditches and doing work around the plant

(R. 1307). He continued at this type of work until September 1937 when the gins opened up and he was given a job tying cotton (R. 1308). He remained at this job until about September 27, 1937, when he injured his finger (R. 1258). He was off about two months with this injury (R. 1258) and during the time he was off with the injury he received workmen's compensation payments (R. 1308, 1309). After he had been released by the doctor he returned to work (R. 1258, 1309). He was put to work doing cleaning up work and other odd jobs (R. 1259, 1318). He continued doing this type of work until about the first of January 1938 (R. 1317), but did not work steadily during this last mentioned period (R. 1319). About the first of the year 1938 Gordon Hammond offered him a job as watchman (R. 1310, 1311, 1320), but he did not take it. Near the end of the year 1937 he got to drinking and gambling and stopped working at these odd jobs for Boswell Company, and left and went to Los Angeles and San Bernardino (R. 1320, 1321).

The Social Security record (Board's Exhibit No. 3, R. 785) shows that Powell received a check in amount of $12.60 for the week ending January 6, 1938, but on cross-examination he testified he did not recall working or receiving this check. (R. 1322).

Prior to leaving for Los Angeles in January 1938 he had issued a worthless check and after he left he was arrested and was brought back to Kings County in February 1938, was convicted of a felony based upon the issuance of such worthless check and was

sentenced to and did serve four months in the county jail as a part of three years probation which was granted him (R. 1303). In addition to the worthless check upon which he was convicted he had also prevailed upon Gordon Hammond to endorse for him another worthless check in amount of $60.00 which he had drawn on a bank in Georgia (R. 1323), in which bank he had no account (R. 1332). He was not working for Boswell Company when he got Hammond to endorse this check (R. 1349). He had cashed this $60.00 check endorsed by Mr. Hammond and lost the money in a poker game (R. 1325, 1326). Gordon Hammond was later obliged to pay the check but he did not sign any complaint against Powell, and Powell later repaid this $60.00 check out of his salary (R. 1329). Powell also admitted on cross-examination that in addition to his conviction on the bad check charge he had also previously been convicted of a felony (stabbing) in the state of Georgia (R. 1347).

After Powell was released from jail, following his conviction on the bad check charge, he returned to work for the Boswell Company on July 3, 1938 (R. 1259) and thereafter worked until he left the plant following the incidents of the morning of November 18, 1938. Powell never applied for work after this last mentioned date (R. 3079).

When questioned at the hearing in this case regarding the nature of the bad check charge upon which he had been convicted, he testified that it was a gambling debt and that he had purchased chips in a poker game with it. He was thoroughly impeached

and discredited by the original transcript in the preliminary hearing in said criminal case. (R. 1359; 2947). Said transcript showed without doubt that the complaining witness had testified in Powell's presence that he cashed the check for Powell and gave him three $5.00 bills. It likewise demonstrates that Powell himself testified and did not deny that he received three $5.00 bills for the check in question. The transcript further shows that he was given an opportunity to make any comment which he chose and he made no comment. When confronted with this documentary proof Powell testified in this case that he could not recall anything that happened at the hearing. (R. 1334-1335).

Powell admitted also the issuance of another worthless check for $60.00 and the fact that he induced Gordon Hammond to endorse it for him. The record shows that Gordon Hammond at no time brought criminal charges against Powell but that the check in question was issued by Powell upon a bank in which he had no account. (R. 1630-1632).

Powell testified on direct examination that he attended the charter meeting of the union on November 5, 1938 and that he told Gordon Hammond the next day about his attendance at the meeting. (R. 1265, 1266). However, upon cross-examination he denied having given this testimony and testified that he did not attend any union meeting or gatherings of union men prior to November 14, 1938. (R. 1370). He first testified on cross-examination that he had known or heard since July 13, 1938 that Prior was

trying to organize the union. (R. 1372, 1373). However, he later testified that it was only about three months before November 18, 1938 that he first heard these rumors. After having testified that he attended the charter meeting of the union held November 5, 1938 he later testified that he first saw the charter November 16, 1938. (R. 1391).

On direct examination he testified that he talked with Gordon Hammond about the union on November 6, 1938. (R. 1260). However, upon cross-examination he admitted that he was mistaken regarding his previous testimony and that he was also mistaken as to the date of the first union meeting he attended. He then claimed that since he first testified he had talked the matter over with his wife who had refreshed his memory. (R. 1399).

Powell also admitted that since first taking the stand he had in addition to discussing his testimony with his wife, also discussed the same with Prior, notwithstanding the trial examiner's admonition to all witnesses that they were not to discuss their testimony in the case with anyone other than Board's counsel. (R. 1400).

He testified definitely that he did not know his good friend Martin had joined the union until November 16, 1938 (R. 1411, 1466) but he later identified his application for union membership (Boswell's Exhibit No. 5, R. 1415) which was dated November 11, 1938, filled in in Martin's handwriting, and he admitted that he turned his application for membership over to

Martin whom he knew was handling the Secretary and Treasurer's duties. (R. 1413, 1466, 1467).

He testified on cross-examination that about November 20, 1938 he had a conversation with Gordon Hammond with reference to a letter he had received from the Company and asked Hammond what it meant. Upon request of counsel for respondents he produced the letter referred to in said conversation and it appeared therefrom that the letter was dated November 28, 1938. (R. 1447, 1448; 1451).

The court in reviewing this case has the power and it is the duty of the court under the law and the authorities to pass upon the credibility of witnesses and the weight and sufficiency of their testimony. **Foote Bros. Gear & Machine Corp. v. N. L. R. B., 114 Fed. (2d) 611, 621 (C. C. A. 7, 1940) (reaffirmed 121 Fed. (2d) 802, 1941); N. L. R. B. v. Union Pacific Stages, Inc., 99 Fed. (2d) 153, 158 (C. C. A. 9, 1938).**

It is also fundamental that the Board has the burden of proof **(Hazel-Atlas Glass Company v. N. L. R. B., 127 Fed. (2d) 109, 114 (C. C. A. 4, 1942); Foote Bros. Gear & Machine Corp. v. N. L. R. B., supra,)** and that such burden is not sustained by uncorroborated hearsay testimony, such as that relied upon by the Board in the instant proceedings. **(Union Drawn Steel Co., v. N. L. R. B., 109 Fed. (2d) 587, 592 (C. C. A. 3, 1940); Martell Mills v. N. L. R. B., 114 Fed. (2d) 624, 629 (C. C. A. 4, 1940); N. L. R. B. v. Illinois Tool Works, 119 Fed. (2d) 356, 363 (C. C. A. 7, 1941).**

III.

THE CHARGES AGAINST RESPONDENT EXCHANGE

A. THE FACTS

The only charge and allegation in the Amended Complaint upon which the Board found the Exchange guilty of violating the Act was the charge and allegation that on or about March 2, 1939, the Exchange, for the purpose of discouraging membership in the Federal, discharged Margaret A. Dunn, herein called Mrs. Dunn, for the reason that it **suspected** that she had engaged in and was engaging in union activities. (R. 9; 21).

Although it was also alleged in the Amended Complaint that the Exchange in discharging Mrs. Dunn was acting directly and indirectly in the interest of respondent Boswell Company for the purpose of discouraging membership in the Federal (R. 21), the evidence did not establish and the Board did not find that such was the case.

The Board contends that Mrs. Dunn was discharged solely because of pressure alleged to have been exerted upon Mr. Glenn by a number of citizens in the community to have her discharged, and that such alleged pressure was the result of the ~~local~~ trouble at the Boswell plant, because two of Mrs. Dunn's daughters were seen talking to Prior at the picket line at the Boswell plant in February 1939.

It was and is the position and contention of the

Exchange that Mrs. Dunn was discharged solely for good cause, and not because of any union activities, suspected or otherwise, nor because of any pressure as found by the Board. The reasons for her discharge, as clearly established by the evidence, were: (1) her physical condition and resulting inability to handle the work properly; (2) her habit of drinking liquor while at work, which was offensive to the other operators; (3) her inability to get along amicably with the other operators in the office, which resulted in dissension between her and the other operators, at least one of whom threatened to quit because thereof; and, (4) her attitude and conduct toward subscribers, which resulted in numerous complaints about her work.

The Board either ignored, or lightly brushed aside, the great mass of direct, competent and credible testimony, which fully supported these contentions of the Exchange, and which evidence was in many instances fully corroborated.

Mr. Glenn testified that about two or three years before March 1, 1939, he first noticed a change in Mrs. Dunn's physical condition, and she informed him at the time that she had been examined by a doctor, who told her she was afflicted with a serious malady and might have to have an operation. (R. 3225-26) He testified that about a year later there was a very noticeable change in the manner in which she was performing her duties. She would brace herself with a pillow when she was sitting at the switchboard and was nervous, and there were times when she would go

to work that she would call a relief operator and go home. (R. 3228).

He testified that about this time he began receiving some complaints about her work, and the complaints thereafter increased in frequency. (R. 3229). Upon being asked to name the complainants, he gave the names of seven or eight business men or farmers in the community who registered such complaints, including Blake Crary, cashier of the bank in Corcoran, and testified that the complaints about Mrs. Dunn were coming in right along. (R. 3230, 3231).

Mr. Glenn testified that about a year before March 1, 1939, he first began smelling liquor on Mrs. Dunn's breath, and a number of times thereafter noticed a bottle of liquor in the ice box at the Exchange. About three or four months after he first began smelling liquor on her breath she told him the doctor had advised her to drink port wine for her strength. (R. 3236-3238). At this time the Exchange had five other operators, including Mrs. Woodruff and her husband, who in addition to acting as part-time operator, also acted as lineman. (R. 3239).

He also testified that during the year and a half immediately preceding March 1, 1939, he noticed there was dissension among the employees in the office. (R. 3240).

Mr. Glenn testified that about November, 1938, he asked Mrs. Dunn why she was not paying more attention to her health, and suggested she lay off and take a rest for awhile, but she stated she had to have money. (R. 3243). He also informed her that the other opera-

tors were complaining very bitterly about her drinking, and that one of them, Mrs. Woodruff, had threatened to quit because she could not stand the dissension that was going on in the office. (R. 3246, 3247).

He testified that in the last part of January 1939, he called Mrs. Dunn into the back office and told her that Albert Armor of the Boswell Company had complained that she was running around nights with Fred Galusha, and they objected very strenuously because Fred Galusha was superintendent of the Anderson-Clayton Gin company and since she was handling their intimate business calls over the phone they objected to her running around with a competitor very much (R. 3250); that Mr. Armor had made this complaint to Mr. Glenn on the morning of the same day he (Glenn) talked with Mrs. Dunn (R. 3251). She told Mr. Glenn that she did not consider it was any body else's business what she did on her own time, and he told her that so far as the personal element was concerned it was none of his business, but so far as the business element was concerned he was going to make it his business and if that thing was going to continue he wanted her to resign. She cried and told him she was very sorry he felt that way about it, and he assured her that she must stop the thing because of the slips that were possible, and she assured him she would stop. He also spoke to her about the dissension that was going on in the office, told her that the girls were complaining and that this dissension in the office would have to stop. (R. 3250-3252). Mr. Glenn testified that Albert Armor, at the time of complaining about Mrs. Dunn running

around with Galusha, had mentioned there had been a leak of information through the Board a couple of years before, and that through that leak one of the Boswell Company's customers had lost a very valuable concession, and Mr. Armor stated if there were any more leaks they felt they should hold the telephone company responsible. (R. 3252).

Glenn testified that about the middle of February, 1939, Mrs. Dunn called him to her home. When he got there she asked him if he had heard anything about a petition that was being circulated. He asked her what the petition was. She said it was a petition to get her discharged because her daughters had gone down to the gin (R. 3255). He told her that he had not heard anything about any petitions of that kind, that she needn't worry—then she went on to say that the girls had talked the morning before about the pickets being down at the gin and she asked them why they didn't go down there and see. The girls had said they hadn't seen any pickets before, how it was worked, so she advised them to go down there and see. He told her the fact of a petition being circulated could have no bearing at all "on our plant", he couldn't take cognizance of that because the exchange was a public service corporation and must keep neutral in everything of that kind. (R. 3255-3256). He also testified that when Mrs. Dunn mentioned the matter same was the first he had heard anything about a petition being circulated and was also the first he had heard anything whatsoever concerning Mrs. Dunn's daughters being seen talking to the pickets. (R. 3257).

Mr. Glenn testified that about 8:00 o'clock on the morning of March 1, 1939, Mr. Woodruff, who was the husband of one of the operators who had been employed at the Exchange for many years, came to his (Glenn's) office in the bank building, and told him Mrs. Woodruff had decided to resign her position. Mrs. Woodruff had also personally advised Glenn that she was going to quit. (R. 3261-3262). Glenn then went to the telephone office and called Mrs. Dunn into the back office and told her that Mrs. Woodruff had informed him that she had made every effort to get along with Mrs. Dunn, but found it impossible to do so, and that she wanted to quit. He told Mrs. Dunn that on account of her physical condition and use of liquor that was so offensive to the girls, that he wanted her to resign. She told him that she couldn't resign; that she simply had to work; that she would go out and apologize to the girls and make every effort to get along. (R. 3260). After Mr. Glenn had talked with Mrs. Dunn in the morning, he went out to his ranch and when he came back about 2:00 o'clock that afternoon, Mrs. Dunn ran past him sobbing hysterically as he entered his office. (R. 3262-3263). When he entered the office he noticed that the faces of the other operators were white and they were very much distraught. He then went on in to the back office, and while he was sitting there the phone rang and it was Mrs. Dunn calling him. She asked if he would come to the house and talk to her, and he told her that he did not want to talk to her any more at that time, and would not go out to her house, that he thought the best thing for her

to do was to stay at home and rest. She then asked if he was going to let her come back, and he told her he did not know, that he would let her know later. (R. 3262-3264).

Mr. Glenn testified that on the morning of March 2, 1939, he telephoned Mrs. Dunn, and when she asked whether he was going to let her come back to work he told her no. (R. 3274-3275).

On the evening of March 1st, and again on the morning of March 2, 1939, Glenn had a conversation with Mr. Dunn. Mr. Dunn desired to know why his wife had beeen discharged. Mr. Glenn stated that the only reason he discharged Mrs. Dunn was because of her physical condition, that she had to drink liquor to sustain herself to keep going, which was very offensive to the other girls, and that it had got to the place where he had to decide between Mrs. Woodruff and Mrs. Dunn, and he let Mrs. Dunn go. (R. 3265-3267). He also informed Mr. Dunn about the complaints that were coming in, and that shortly before these conversations a party had come to him and mentioned the fact that there had been some talk about getting up a petition to the Railroad Commission asking that Mr. Glenn discharge Mrs. Dunn because of the rotten service she was giving subscribers. (R. 3272-3273).

Mr. Dunn informed Mr. Glenn that he was not interested so much in Mrs. Dunn's going back to work at the office as he was in clearing any reflection that might be cast upon the girls for going down to the Boswell gin. Mr. Glenn assured him that the girls going down to the gin had nothing whatsoever to do with

the discharge of Mrs. Dunn. (R. 3277, 3278), but it was very unfortunate that the girls had gone to the picket line when they did, because there had been some labor trouble in 1934, at which time the whole community had been paralyzed for thirty days due to a strike and this previous labor trouble was still fresh in the minds of everyone in the community, and as long as the picket car remained down at the Boswell gin the people in the community would still be jittery about labor trouble. (R. 3280-3282; 3285-3286).

Glenn also testified that he had never seen any petition circulated by anyone requesting Mrs. Dunn's discharge; that no such petition was ever presented to him by anyone, and that prior to the time of discharging Mrs. Dunn on March 2, 1939, no pressure of any kind had been exerted on him to discharge her. (R. 3276).

Mrs. Dunn, in giving her version of the matter testified, over the objection of respondents, that it had been reported to her about February 15, 1939, by Mr. Galusha, manager of the San Joaquin Ginning Company, who had obtained the information from another party, that a petition was being circulated by some unknown parties to have her discharged because her daughters had been seen talking to the pickets at the Boswell gin. (R. 2497-2500). She testified that the following day (February 16, 1939) she asked Mr. Glenn if he had heard about this petition, and he said he had not, but stated he had been approached by a number of men about having her discharged on account of leakage on the Board and the girls being seen associating

with the union men, but her work had been satisfactory, and he would not discharge her unless presented with actual facts. She further testified that during this meeting they also talked over the labor trouble at the Boswell gin, and he told her "what everybody else knew in town" that there had been a disturbance, and that any little thing might cause an awful lot of disturbance in town (R. 2500-2501).

She also testified that on Saturday morning of the same week, which would be February 18, 1939, she talked with Mr. Glenn again in her home. (R. 2502). She testified she told Glenn she had talked with Mr. Galusha, who had told her he had talked with Mr. Riley, who in turn had talked with Bill Boswell, who had stated in effect that he, Bill Boswell, was going to get her job and was not going to tolerate having any of the Dunn family associating with the pickets. Respondents strenuously objected to this fourth-hand hearsay testimony relating to what Bill Boswell purportedly told Riley, who told Galusha, who told Mrs. Dunn, but all such objections were overruled. W. W. (Bill) Boswell, when called as a witness by the Exchange, categorically denied having made any such alleged statement to Riley or anyone else. (R. 3206, 3207). She testified she did not remember what reply Mr. Glenn made, excepting only that they just talked over the situation again, and he asked if the girls were going out with any of the men, and she said no. (R. 2502-2505).

She testified that her next conversation with Mr.

Glenn was on the morning of March 1, 1939, in his office. She claimed he told her pressure was being brought to bear too heavily on him, and he would have to ask her to resign, stating there was nothing personal about her work, but she refused to resign. (R. 2506).

Mrs. Dunn testified that the following morning, March 2, 1939, Glenn telephoned and told her not to return to work (R. 2507), stating that she was getting too old for the work and was sick, and he thought she ought to stay home. (R. 2508).

On March 14, 1939, Mrs. Dunn filed a charge with the Regional Office of the Board in San Francisco against the Exchange. This charge was signed by her personally, but was never served on any of the respondents. (R. 1).

She testified, over the objections of respondents, that on March 21, 1939, she talked separately with three parties named Riley, Slaybaugh and Boyett, and sought their advice about pressing the charges, and requested some of them to be witnesses for her and to use their influence with Mr. Glenn to get her job back. They all advised her against pressing the charges. (R. 2909-2916). As the result of the advice given her by these persons, none of whom were in anywise connected with respondents, she telegraphed the Regional Director not to send a respresentative to investigate the case; that everything was satisfactory. (R. 2517).

On April 4, 1939, Mrs. Dunn wrote the Regional office of the Board in San Francisco advising that the matter had not been settled satisfactorily, and request-

ed that they hold the case open until hearing from her again. (R. 2518, 2519).

She testified over the objection of respondents that after again talking separately with Riley and Boyett, she wrote the Regional office of the Board in San Francisco on April 14, 1939, requesting that her case against the Exchange be dropped, and stating she would not be available for interviews with anyone. Her signature on this letter was acknowledged before a Notary Public. (R. 2520-2526; Board's Exhibit No. 23). Boyett helped her write the letter (R. 2527).

The Fourth Amended charge upon which this case went to hearing was signed and filed by Prior on May 4, 1939. (R. 3). There was no showing in the evidence that Mrs. Dunn ever authorized Prior, either directly or indirectly, to sign and/or file this charge on her behalf.

Despite the fact that she had requested the Board on April 14, 1939, to drop her case against the Exchange, she and her husband and daughter, who, with the exception of Mr. Glenn, were the only witnesses called by the Board in support of the alleged case against the Exchange, were each compelled to appear and testify against the Exchange under the compulsion of a subpoena. (R. 1669; 2497; 2560).

Upon cross-examination Mrs. Dunn admitted that about three years before she filed her charge against the Exchange she was seriously ill, and that during the year immediately preceding March 1, 1939, she was in pain from time to time while working at the job, and had mentioned that fact on occasions both to the other

operators and to Mr. Glenn. (R. 2541). She denied, however, that she ever drank liquor while on duty, and that she kept any liquor in the ice box in the office at the Exchange. (R. 2542). She admitted that during the year immediately prior to March 1, 1939, she had on occasions gotten into arguments and disputes with customers of the Exchange while handling their calls, but denied she had any more arguments or disputes than any other operator. (R. 2543). She admitted one of the customers she argued with was Mr. Crary of the bank. She also admitted there was plenty of other occasions when she had words with customers, but claimed that during the year previous to March 1, 1939, there had been less arguments than ever before. (R. 2544).

Mrs. Dunn also admitted on cross-examination that upon the occasion of her second conversation with Mr. Glenn, the date of which she fixed as March 1, 1939, he called attention to her illness, and asked her why she didn't give up her position in view of the fact that her husband was working. (R. 2546-2547). She also admitted that on the day Mr. Glenn asked her to resign, he told her there had been complaints made against her about the service. (R. 2548). She also admitted that several months before the hearing she told Mr. Glenn that she had to take four glasses of port wine a day for her health, but claimed she did not keep any wine at the office and did not drink while on duty. (R. 2551-2552).

Upon cross-examination Mrs. Dunn also testified that she had never become a member of any labor or-

ganization, and in particular that she was not a member of any labor organization with which Prior was connected, and had never in any manner assisted or aettempted to assist any of the organizations mentioned in this case (R. 2574-2575).

Mr. Dunn testified he was positive his wife had never become a member of a labor organization, and so far as he knew she had never assisted a labor organization in any manner and had never attempted to assist any labor organizations in any manner. (R. 2571-2573).

Mr. Dunn when testifying to his conversation of March 2, 1939, with Mr. Glenn, testified that Mr. Glenn made the following statements, "I went into the Exchange the other day and I met your wife coming out of the door, she was half crying. I went on in and Lillian Fowler was crying at the board." "I just can't stand that stuff." (R. 2576).

All of Dorothy Dunn's testimony went in over the objections of respondents. She testified she was Mrs. Dunn's daughter, and that on February 1, 1939, she first met Mr. Sprecher, an attorney for the Board, while making a bus trip from Los Angeles to Corcoran (R. 1669); that Prior met them at the bus station in Corcoran and they all drove to her home in Prior's car. She and Sprecher went into the house, leaving Prior in the car, and found Secord there with her brother and sister. (R. 1670, 1671). Secord was an engineer employed by the Boswell Company (R. 1678), and there was absolutely no showing that he was authorized to

speak in any way for any of the respondents.

She further testified that after Sprecher left the house, Secord told her it was bad for her to be seen with Prior. (R. 1672). That she saw both Sprecher and Prior on the street in Corcoran the next day, and did not see Prior again until about February 8, 1939, when she and her sister stopped and talked to him at the picket line at the Boswell plant. (R. 1673). Prior came over to their car and she and Prior talked over a few personal things about her knowing Sprecher; also they talked about the "Boswell strike" and about the hearings that would be held. (R. 1674). She also testified that while talking with Prior, Riley and his daughter drove by and waved to them. This was the last time she ever saw Prior or Sprecher. She testified that two or three days later she met Secord in a soda fountain, and he told her she was very much in wrong with the people of Corcoran because she had been seen at the picket line, and that she should apologize to W. W. Boswell, the brother of J. G. Boswell, owner of the Boswell Company, as W. W. Boswell was very angry because she had been to the picket line. (R. 1675, 1676). However, she never talked with Mr. Boswell or Mr. Glenn regarding this matter. She testified she did not know either Prior or Sprecher before February 1, 1939. (R. 1678, 1679).

At the conclusion of Dorothy Dunn's testimony all of the respondents moved to strike all her testimony upon the ground that there was no showing that the Board had jurisdiction over the respondents and that her testimony was hearsay, incompetent, irrelevant

and immaterial. These motions were denied. (R. 1681, 1682).

It is stated in the Board's Brief (page 35) that "Early in February 1939 Mrs. Dunn's daughter, Dorothy, was observed speaking to Federal members who were picketing the Boswell Company's plant . . . . ; on subsequent occasions during the month, Dorothy and her sister, Margaret, were also seen talking to Federal organizer Prior." It is also stated in the Brief, on the same page, that the Dunn family soon began to receive information from local citizens that Dorothy was in wrong with the people of Corcoran, particularly with the Boswell Company's president because she had been seen on the picket line.

Obviously these statements are not supported by Dorothy Dunn's testimony upon which they are based. In fact these statements are not even in accordance with the Board's findings on the matter. (R. 587).

Mr. Glenn's testimony was subsequently corroborated by Mr. Woodruff and Mr. Crary, who were called as witnesses by the Exchange.

Mr. Woodruff, who had been employed by the Exchange as lineman since July 1929, and whose duties required him to go in and out of the office every day (R. 3309, 3310), testified that about June or July 1938 he noticed a bottle marked "Port Wine" sitting on the ice box in the office. Mr. Glenn came by and asked him who the bottle belonged to, and he replied that he guessed it was Mrs. Dunn's. Afterwards he asked Mrs. Dunn why she had left the bottle there, telling her Mr.

Glenn had asked about it, and she said she forgot to put it away.

He further testified that in August or September 1938 he saw a bottle of wine, which was partly full, under the counter in the operating room. Mrs. Dunn told him she had been to see a doctor, who prescribed the wine for her, and she was using it for nourishment; that she couldn't eat any food at all; that was the only thing she had for nourishment. (R. 3311, 3312; 3317; 3319).

Mr. Woodruff also testified he had upon different occasions when he was in and out of the office smelled liquor on her breath. (R. 3313, 3314).

He also testified that in the latter part of February, 1939, he talked with Mr. Glenn at the latter's office in the bank building, and told him he had gone to the telephone office and found Mrs. Woodruff crying; that when he asked her what the trouble was, she said she and Mrs. Dunn had a misunderstanding. Mr. Woodruff requested that Mr. Glenn investigate and discharge Mrs. Woodruff if she was in the wrong. (R. 3315, 3316).

Woodruff also testified that at times he saw Mrs. Dunn taking a drink while she was on duty, and particularly on the morning when he talked with her about the middle of 1938 about the bottle of wine on the ice box, at which time she told him she had been to a doctor and hadn't had anything to eat for a couple of days; that she couldn't have solid food on her stomach, and the wine was the doctor's prescription. (R. 3320).

Blakely Crary, cashier of the First National Bank

of Corcoran, when called as a witness for the Exchange, testified that he had been connected with the bank since 1934, and before that time was assistant cashier of the predecessor bank that had closed, and was assistant conservator of the old bank after its closing. He testified that he had known Mrs. Dunn ever since he came to Corcoran in 1930; that the bank had two trunk lines and four telephones, and he also had a telephone in his home, and recognized her voice over the telephone. He testified that during the two year period preceding March 1, 1939, he complained to Mr. Glenn a number of times regarding the service rendered by Mrs. Dunn when she was on the switchboard, and in particular he told Mr. Glenn in January 1939 that he (Crary) had attended a dinner party a few nights before and the subject of the poor service of the Exchange was discussed, and one member of the party said that they intended to complain to the Railroad Commission unless the service was improved. (R. 3303-3305).

He further testified that during the two year period prior to March 1, 1939, he never had any trouble with any of the other operators, and did not register any complaints with Mr. Glenn regarding any of the operators besides Mrs. Dunn. He also testified that he used the telephone a great deal—probably 20 or 30 times a day, but he never had any complaints to make against anyone except Mrs. Dunn (R. 3307), and he always recognized her voice when she was on duty. (R. 3308).

B. The Board's Findings with respect to the Exchange are not supported by substantial evidence.

As stated above, a substantial part of the testimony adduced by the Board in support of its alleged case against the Exchange was incompetent hearsay testimony, particularly the conversations which Mrs. Dunn testified she had with various parties other than Mr. Glenn, and all of Dorothy Dunn's testimony.

Mrs. Dunn's entire lack of credibility and the lack of credibility of Dorothy Dunn is clearly demonstrated by the record. The following testimony is pertinent in considering the unreliability of their entire testimony:

Dorothy Dunn testified she first met Sprecher on the bus while coming from Los Angeles to Corcoran about February 1, 1939 (R. 1669, 1670). However, her mother, Margaret A. Dunn, stated in the sworn charge which was filed with the National Labor Relations Board at San Francisco against the Exchange, March 14, 1939, and the jurat of which was dated March 13, 1939, that "the accusations came because my daughters were talking to Mr. Prior, a labor organizer. They, however, were receiving a personal message through Mr. Prior from Drexel Sprecher, a National Labor Relations Board attorney, who one of my daughters met in Los Angeles long before there was any labor trouble in Corcoran." (R. 1). Mrs. Dunn admitted that the reference in the above quoted portion of the charge to one of her daughters referred to Dorothy Dunn. (R. 2534). Dorothy Dunn also testified that after coming to Corcoran she received a letter from Mr. Sprecher and about February 8 she stopped at the picket line at

the Boswell plant and spoke to Prior about this letter, and they discussed a few personal things about her knowing Mr. Sprecher (R. 1673, 1674). This fact supports the statement made by her mother that she (Dorothy Dunn) had met Sprecher long before any labor trouble at the Boswell plant arose.

Dorothy Dunn also testified that she did not know Prior before the time she met him at the bus station in Corcoran on February 1, 1939 (R. 1670). However, she also testified that she introduced Mr. Sprecher and Prior to each other (R. 1672). Upon cross examination she denied having given any such testimony. (R. 1679).

She testified on direct examination that while talking with Mr. Prior at the Picket line on February 8, 1939, they talked about "the Boswell strike" (R. 1674). However, upon cross-examination she denied that anything was said about a "strike" and stated they were not talking about the strike. (R. 1679, 1680).

The entire lack of credibility of Mrs. Dunn's testimony is illustrated by the following instances (in addition to the other instances hereinabove referred to):

Mrs. Dunn testified on direct examination that she had a conversation with Mr. Glenn on each of the following dates to-wit, on or about February 16, 1939 (R. 2497-2500), one on Saturday morning of that same week, which would be February 18, 1939 (R. 2502), one on March 1, 1939 (R. 2506), and a telephone conversation on the morning of March 2, 1939 (R. 2507). However upon cross-examination, she testified that her second conversation was on March 1, she was positive

it was on March 1 (R. 2546). Upon again being asked to fix the date of the second conversation she again testified positively that it was March 1 (R. 2549). This testimony is substantiated by the testimony of Mr. Glenn, who testified that he talked with Mrs. Dunn about the middle of February 1939, when he went to her home and saw her at her request (R. 3255), and that the next time he talked with Mrs. Dunn regarding her work was March 1, 1939, which conversation was held at the telephone office. (R. 3258).

When asked upon cross-examination if she had heard about there being some disturbance at the Boswell plant in November 1938, she stated "I don't remember" (R. 2536), but finally admitted when pressed that she had heard the talk around town from time to time concerning the Boswell situation ever since it existed. (R. 2536, 2537).

On cross-examination, Mrs. Dunn was asked how long it was before she took the stand that morning that she last talked with anyone concerning her testimony in the case (R. 2549) and she replied, "Well, I don't know." She was then asked if she had gone over her testimony with Board's counsel, and was forced to admit that she had gone over the matter with one of the Board's attorneys the previous night (R. 2550).

On direct examination, Mrs. Dunn testified that it was during her conversation of February 16, 1939, with Mr. Glenn that leakage of information over the board was mentioned. (R. 2500, 2501), but on cross-examination she testified that the conversation during which complaints against her were discussed was the

conversation of March 1. (R. 2546-2548).

Glenn's explanation of the reasons for discharging Mrs. Dunn was not only reasonable but was in practically every material respect corroborated by facts testified to by other persons, including Mrs. Dunn herself, and the Board utterly failed to sustain its burden of proving by substantial evidence that her discharge was discriminatory. The evidence shows that Glenn had ample and justifiable causes for discharging her, and that such causes accumulated over a long period of time and had their inception long prior to the occasion of any labor trouble at the Boswell gin.

It is apparent that the immediate matter which prompted Mr. Glenn to discharge Mrs. Dunn on March 2nd was the fact that before talking with her on the morning of March 1st, he had been informed by both Mrs. Woodruff and her husband that even though Mrs. Woodruff had tried her best to do so she had found it impossible to get along harmoniously with Mrs. Dunn in the office and intended to resign. When Glenn thereafter on the morning of March 1st spoke to Mrs. Dunn regarding the dissension and informed her of Mrs. Woodruff's intention to resign because thereof, Mrs. Dunn assured him she would go and apologize to the other operators, and would make every effort to get along with them. However, when Mr. Glenn returned to the telephone office later in the day, and as he entered the door, Mrs. Dunn ran past him sobbing hysterically, and he found upon entering the office that the faces of the other operators were white and they were very much distraught, it was apparent that the dis-

sension had not ceased, despite Mrs. Dunn's promises. Glenn was then confronted with the necessity of either discharging Mrs. Dunn or losing the services of Mrs. Woodruff, who so far as shown by the evidence, was an efficient and satisfactory operator, with many years of service at the Exchange. Clearly the course subsequently pursued by him was justifiable and reasonable in view of Mrs. Dunn's physical condition, her habit of drinking wine while on duty, which was offensive to the other operators, the numerous complaints which had been registered by various subscribers over a period of one or two years regarding her services, and the continued dissension in the office.

The Board rests its entire case and the validity of its findings on its conjecture and suspicion that Mrs. Dunn was discharged because of alleged pressure brought upon Mr. Glenn by certain unidentified individuals to have her discharged, as the result of her daughters having gone to the picket line. The only testimony relative to alleged pressure upon Glenn to fire Mrs. Dunn consisted of rumors and hearsay some of which was three or four times removed. No direct evidence was offered in support of the charge or findings that the Exchange was guilty of an unfair labor practice in discharging Mrs. Dunn and the finding that pressure was brought to bear upon Glenn by various persons to secure her discharge was based solely upon this remote hearsay testimony.

In **N. L. R. B. v. Jones & Laughlin Steel Co., 301 U. S. 1, 81 L. ed. 893, 916,** the Supreme Court stated the law as follows:

> "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion . . . ."

The presumption is that the employer has not violated the law, and the burden of proof is upon the Board to show that the discharge was because of union activities. **N. L. R. B. v. Union Mfg. Co., 124 Fed. (2d) 332, 333, (C. C. A. 5, 1941).**

In **N. L. R. B. v. Goshen Rubber & Manufacturing Co., 110 Fed. (2d) 432, the Court stated, page 436:**

> "It is well to remember that the National Labor Relations Act does not interfere with the normal right of the employer to select his employees or to discharge them, ...; that the burden of proof that an employee has been discriminatorily discharged is upon the complainant and the Board, ... N.L.R.B. v. A. S. Abell Co. . . . . that interfer- with the right of an employer to determine when an employee is inefficient should not be lightly indulged in when applying the Act . . . ."

In **Martel Mills v. N.L.R.B., 114 Fed. (2d) 624 (C.C.A. 4, 1940)** the Court in discussing the employer's excuse for his delay in reinstating a discharged union employee, stated, page 631:

> "If his explanation is a reasonable one, the onus is upon the Board to establish the falsity of this explanation and the truth of its own interpretation."

In **N.L.R.B. v. Vincennes Steel Corp., 117 Fed. (2d) 169,** the Court held that where the employer discharges

an employee because in good faith he believes the employee is inefficient or physically incapacitated to perform his duties properly, such discharge is not discriminatory, even though the employer does not immediately discharge the employee after first acquiring such belief.

Where an employee has been discharged for cause and there is merely an implication that union activities might have been a factor, conjecture, suspicion, surmise, mistrust or guess-work alone are not sufficient to support a finding of discrimination. **N.L.R.B. v. Thompson Products Inc. 97 Fed. (2d) 13, 17 (C.C.A. 6, 1938); Cupples Co. v. N. L. R. B. 106 Fed. (2d) 100, 118, (C. C. A. 8, 1939); Burlington Dyeing & F. Co. v. N. L. R. B., 104 Fed. (2d) 736, 739 (C. C. A. 4, 1939); Cudahy Packing Co. v. N. L. R. B., 116 Fed. (2d) 367, 371 (C. C. A. 8, 1940).**

C. THE BOARD'S ORDER FOR REINSTATEMENT IS CONTRARY TO LAW

Although Mrs. Dunn personally signed and filed a charge against the Exchange with the Regional Office of the Board in San Francisco on March 14, 1939 (R. 1), this charge was never served on any of the respondents. The case went to hearing on the Fourth Amended charge signed by E. F. Prior, as business representative of the Federal, and filed with the Regional Office of the Board in Los Angeles on May 4, 1939. (R. 3).

There was not a scintilla of evidence, however, that she authorized Prior to sign or file the Fourth

Amended charge on her behalf, and before the introduction of any testimony at the hearing the respondents objected to the introduction in evidence of the charge signed by Mrs. Dunn on the ground that said charge had never been served upon any of the respondents; that the only charge served on any of the respondents concerning the Exchange or Mrs. Dunn was that contained in the Fourth Amended charge, a copy of which was served with the Amended Complaint issued May 6, 1939; that the Fourth Amended charge was made by E. F. Prior, as business representative of the Federal; that there was no showing or allegation that Mrs. Dunn was or intended to become a member of the Federal, or that she had engaged in any union activities, or had any connection whatsoever with any union; and that there was no authority shown or alleged for Prior to act in any respect for her in the filing of the Fourth Amended charge; and upon the further ground that her charge was incompetent and irrevelant. (R. 698-704).

The respondents at said time also objected to the admission in evidence of the Fourth Amended charge insofar as said charge concerned Mrs. Dunn and the Exchange, upon all of the grounds raised in connection with the admission in evidence of Mrs. Dunn's charge. (R. 704; 721; 725).

The Trial Examiner erroneously over-ruled all of the objections so interposed and admitted both of the charges in evidence, (R. 726), to which ruling the respondents excepted.

The respondents thereafter repeatedly through-

out the hearing interposed the same objections either by objecting to the introduction of testimony or by moving to strike testimony admitted over their objections. (R. 1666, 1667; 2664; 3324, 3325). The respondents also raised the same issues in their exceptions to the Intermediate Report. (R. 162, 163; 167-169; 170, 171; 174; 465; 1681, 1682).

The Trial Examiner consistently sustained objections to all questions intended to establish who was eligible to membership in the Federal. However, the Board itself found that the Federal admits to its membership employees of the Boswell Company. There was no evidence that Mrs. Dunn was eligible to membership in the Federal.

She testified and so did her husband that she was not a member of any labor organization, and in particular that she was not a member of any labor organization with which Prior was connected, and that she had never in any manner assisted or attempted to assist any such labor organiaztions. (R. 2571-2575).

The Board was without jurisdiction to entertain the Fourth Amended charge with respect to Mrs. Dunn, because there was no showing either that she had authorized Prior to file such charge or that she was a member of or assisting any organization of which Prior was a representative. In **N.L.R.B. v. Indiana & Michigan Electric Co., 124 Fed. (2d) 50 (C.C.A. 6, 1941), at page 57,** the court stated:

> "A labor organization filing a charge with the Board must have some direct connection with, or relationship to the employees of the employer of which complaint is made, and such organization

> must be capable of acting as a bargaining representative of such employees if it should be so selected. Any other interpretation of the Act would admit intermeddlers, resulting in a diversion of the Act's purposes to private acts . . . .
>
> ". . . it is clear that the Congress intended that only employees having a grievance because of unfair labor practices and labor organizations capable of acting as bargaining representatives could overcome statutory inertia of the Board to take jurisdiction of controversies arising pursuant to the statute."

No showing was made that there was any current labor dispute or labor organization at the Exchange, and on the contrary the evidence showed there was no such dispute or organization. When it is considered that there was no labor dispute at the Exchange, and that Mrs. Dunn was not a member of the Federal or any other labor organization and in fact was not even eligible for membership in the Federal, and that she had never assisted or attempted to assist the Federal or any other labor organization, it is clear that the Board utterly failed to make any showing that she came within the scope of the Act, or that she was in anywise entitled to or deprived of any of the rights conferred by the Act. Moreover, there was no evidence whatsoever showing or tending to show that she had attempted to or desired to exercise any of the rights mentioned in Section 7 of the Act, or that she was ever encouraged or discouraged from joining any labor organization. Neither was there any evidence which showed or tended to show that she was discharged for the purpose of discouraging membership in the Federal, as charged in

the amended complaint, or that her discharge had the effect of discouraging membership in the Federal, as found by the Board.

The courts have held that before reinstatement of a discharged employee can be ordered by the Board it must be shown not only that the employee was discriminatorily discharged, but also that the discharge was for the purpose of, and actually had the effect of, discouraging membership in a union. **N.L.R.B. v. Air Associates, Inc. 121 Fed. (2d) 586, 592, (C.C.A. 2, 1941); Stonewall Cotton Mills, Inc. v. N.L.R.B. 129 Fed. (2d) 629, 632, (C. C. A. 5, 1942).**

There was no evidence that Mrs. Dunn ever applied for reinstatement following her discharge on March 2, 1939. Nor is there any evidence that following her discharge she was replaced with a new employee. The fact that Mrs. Dunn was not replaced is alone sufficient ground for the court to deny enforcement of the Board's order for her reinstatement. In this respect we respectfully call the court's attention to the authorities hereinabove cited in connection with the Boswell Company's case.

The Board in its Brief (p. 38) cites cases to the effect that the discharge of a non-union employee because of a mistaken belief that he is sympathetic to or active in a union violates Section 8 (1) (3) of the Act; and the Board argues inferentially that Mrs. Dunn was discharged solely because of a mistaken belief on the part of Glenn that she was sympathetic to or active in the Federal. We submit, however, that there is not a scintilla of evidence in this case to support such

argument, or to show either that Mrs. Dunn was sympathetic to or active in any union, or that Glenn believed she was. As a matter of fact the evidence is all to the contrary. Mrs. Dunn's daughters were, according to the testimony of Dorothy Dunn, at the picket line upon only one occasion, namely February 8, 1939, and then the only purpose of her visit was to see Prior, who was the only one they talked with while there. Dorothy Dunn testified she never saw Prior after that date. The evidence shows that Mrs. Dunn herself was the first one to acquaint Glenn with the fact that the girls had gone to the picket line, and she explained to him the occasion for their visit which clearly had nothing whatever to do with the labor trouble at the Boswell plant or any of the activities of the Federal.

The Board also calls attention (Brief p. 39) to two cases which it claims support the general statement that the fact that the alleged union activity of an employee extends outside own employment is immaterial. The cases so cited are Fort Wayne Corrugated Paper Co. v. N.L.R.B. 111 F. (2d) 869, 874, and N.L.R.B. v. Peter Caillier Kohler Swiss Chocolates Co. 10 L.R.R. 742 (C.C.A. 2). An examination of these cases discloses, however, that the facts in each thereof were entirely dissimilar from the facts in the instant case, and that the rules of law laid down in each of said cases, although applying to the facts of the particular case, are clearly not applicable or controlling in the instant case.

In the **Corrugated Paper Company** case it appears that an employee named Markins was an active union employee of the respondent company, and that he also

served as chairman of the district union council, and in the latter capacity represented employees of a glass company which was one of the respondent's customers. Markins was called into the office of the general manager of the respondent and was told by him that the glass company had withdrawn its business because of Markins' union activities on behalf of the glass company's employees, and that Markins would have to cease such activities or be discharged. On the basis of this evidence the court upheld the findings by the Board that respondent had interfered with Markins in the exercise of rights guaranteed by Section 7 of the Act. The court at page 873 of its opinion states that the acts with respect to Markins involved the construction of Sections 8 and 9 of the Act granting an employee the "right to form, join, or assist labor organizations" and "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." The court then held that the Act would not be construed to protect union activities only in the interrelationship between employees and employers of one company; however, the court also commented (p. 874) that an impartial observer might question the wisdom of an employee who acts to cause his employer's customers to cancel its orders and that such activities may be such as to invite the belief that the employee's case was one of exaggerated ego, in which case the employer would be justified in discharging such employee, and that in every case of such activity it is a factual controversy to determine whether or not a discharge for such activities is justified.

In the Swiss Chocolate Company case, the Board petitioned for enforcement of its order which included a direction for the reinstatement of one Whipple. It appears that respondent employer had a contract for the purchase of all surplus milk from the Dairymen's League, and that when the Dairy Farmers Union which supplied the League with milk declared a strike against the League, respondent employer helped to defeat the strike. It further appears that the "P.C.K.", a union of respondent's employees, of which Whipple was the president, adopted a resolution condemning respondent employer for such aid, and that such resolution was published in the papers, and that respondent employer feeling it was injurious to his business discharged Whipple. Respondent employer contended before the court that the Act was designed to protect only "employees" and that, since the Dairy Farmers' Union was not made up of employees but of farmers Section 7 did not sanction P.C.K.'s action in support of the Farmers' Union. The court directed that the order, including the portion relating to the reinstatement of Whipple be enforced, saying that while it was true that only those employees defined by Section 2 (3) of the Act can invoke Section 7 of the Act, and that therefore members of the Farmers' Union could not invoke Section 7, it followed that so far as the resolution adopted by P.C.K. was a "concerted activity" for the "mutual aid and protection" of the farmers on the one hand and the members of P.C.K. on the other, the section did not cover it. However, sofar as the resolution was a "concerted activity for the purpose" of

the "mutual aid and protection" of the members of the P.C.K. themselves, the section did cover it. The court found that the action by P.C.K. in adopting and publishing its resolution was intended for its own benefit in that it secured to them the support of the Farmers' Union which might prove an important factor in future disputes with the respondent company.

It is apparent that the distinguishing features in each of the cases cited by the Board are (1) that in each of said cases the employees of the respondent, as well as those of the other employer concerned, were each organized; and (2) that the employees of the respondent company who were discriminated against were in each instance active in furthering and supporting the activities of the organized employees of the other employer, and a benefit either direct or indirectly would or could result to the union members of the respondent company.

In the instant case, however, the uncontradicted evidence showed, as previously stated, (1) that there was no union organization at the Exchange; (2) that Mrs. Dunn never assisted or attempted to assist the Federal in any way; and (3) that even though she had assisted or attempted to assist the Federal, neither she nor any of the employees of the Exchange would or could possibly derive any benefit from such activity. It is clear in this case that (1) Mrs. Dunn was not an employee within the definition of the Act; (2) that her discharge did not and could not have either the purpose or the effect of discouraging membership in the Federal or in any other labor organization; and (3)

that her discharge did not and could not lead to any labor dispute or in anywise burden, obstruct or interfere with interstate commerce.

IV.

RESPONDENTS WERE NOT AFFORDED A FAIR AND IMPARTIAL HEARING

Both of the respondents in this case duly excepted before the Board to the manner in which the hearing was conducted by the Trial Examiner (R. 175). The record shows that the hearing was not conducted in a fair and impartial manner, but on the contrary the Trial Examiner throughout the entire hearing showed marked bias and prejudice in favor of the Federal and Board's counsel and case, and against respondents and their counsel and case.

(a) Throughout the entire hearing the Trial Examiner displayed animosity toward counsel for respondents and frequently and repeatedly during the course of the hearing became angry with and argued with respondents' counsel, and several times threatened to bar such counsel from further participation in the hearing, without any reason, cause or justification whatsoever for such conduct or acts on the part of the Trial Examiner.

Space does not permit our setting forth in detail all the portions of the record which show the attitude and conduct of the Trial Examiner in this respect or quoting the record. A few examples of the conduct referred to in the foregoing paragraphs are shown by

the proceedings which appear in the following portions of the record to which we respectfully call the court's attention:

Examination of Glenn (R. 3231-3236);

Cross-examination of Powell (R. 1299-1303);

Cross-examination of Farr (R. 1065-1068; 1081-1084);

Cross-examination of Prior (R. 1115-1117; 1141-1143; 1146-1149);

Cross-examination of Spear (R. 1551-1553; 1580-1583);

Cross-examination of Griffin (R. 1907-1909); and

Recross-examination of Mrs. Dunn (R. 2573, 2574).

(b) The Trial Examiner showed a hostile attitude toward witnesses called by respondents, and a friendly attitude toward witnesses called by the Board. In numerous instances he cross-examined and argued with witnesses called by respondents; however, he rarely examined the witnesses called by the Board, and when he did his examination was in the nature of a friendly and leading examination.

For example, after E. C. Powell, one of the witnesses called by the Board, had been thoroughly impeached and discredited, the Trial Examiner attempted, by leading and suggestive questions, to rehabilitate him. One of the respects in which Powell had been impeached was his admission that he had been convicted of a felony for which he had been imprisoned as one of the conditions of probation. He testified to certain details of his conviction directly contrary to the official reporter's transcript in the criminal proceeding

in question (R. 2947; Boswell's Exhibit No. 21). After he was impeached by the official reporter's transcript in that proceeding, the Trial Examiner endeavored by leading questions to elicit testimony from Powell to the effect that he had been improperly and unfairly treated and convicted, and had not been advised of his legal rights, when, in fact, the official reporter's transcript in that proceeding showed conclusively that he had been properly informed of his rights and fairly and properly tried and convicted (R. 1324-1329; 1340-1345).

Another instance when the Trial Examiner questioned one of the Board's witnesses for the obvious purpose of endeavoring to fortify the Board's case, was during the testimony of Johnston (R. 975-977).

Some of the examples of the numerous instances of hostile cross-examination of, and arguments with, witnesses called by respondents are the following:

C. H. Glenn (R. 2493-2495)—This witness was first called by the Board for the purpose of endeavoring to establish jurisdictional facts with respect to the Exchange. After Board's counsel finished examining the witness, the Trial Examiner took over the witness and endeavored to elicit additional jurisdictional facts.

Blakely G. Crary (R. 3307)—After this witness for the Exchange had been fully examined by all counsel, the Trial Examiner endeavored by further cross-examination to discredit his previous testimony.

James W. Woodruff (R. 3320-3322)—After the examination of this witness for the Exchange had been completed by all counsel, the Trial Examiner took over

the examination, and over the objections of respondents endeavored to discredit the witness's previous testimony.

Louis T. Robinson (R. 2814; 2905-2911)—While this witness for Boswell Company was being cross-examined by counsel for the Board and was being asked a number of vague questions, which the witness obviously did not and could not understand, the Trial Examiner not only argued with the witness, but instructed him to answer the questions without giving him any opportunity to have the meaning of the questions explained or to give his answer. This is in direct contrast with the friendly attitude of the Trial Examiner toward Mrs. Dunn. While she was being cross-examined for the purpose of impeachment and hesitated in her answer to perfectly clear questions the Trial Examiner instructed her to just take her time. (R. 2549).

James W. Hubbard (R. 2287, 2288)—The Trial Examiner took over the examination of this witness and endeavored to fortify the Board's case by trying to establish that the witness occupied a supervisory capacity with Boswell Company.

John A. Case (R. 2717, 2718)—This witness for the Boswell Company was examined by the Trial Examiner after all examination by counsel had been completed, and the Trial Examiner endeavored to fortify the Board's alleged case against the Boswell Company.

Roger R. Walch (R. 935-937)—After the examination of this witness for the Boswell Company was completed by all counsel the Trial Examiner endeavored

by examining the witness to discredit his previous testimony.

Samuel Brenes was called as a witness by the Board in connection with the Association phase of the case. After his examination and cross-examination had been completed by all counsel the Trial Examiner took over the witness and endeavored to establish that he was the senior bookkeeper in the Boswell Company's local office (R. 2453). The testimony so elicited by the Trial Examiner is the principal basis of the Board's findings that Brenes is an alleged supervisory employee —an employee who is closer to the management than he is to the rank and file of the employees. (R. 572-579).

(c) The Trial Examiner repeatedly during the hearing made statements off the record, which properly belonged therein. In several instances such statements were made over the objection of respondents. During the numerous off the record discussions which took place at the order of the Trial Examiner he made statements which clearly revealed his bias and his animosity toward respondents, and severely criticized counsel for respondents without any cause therefor. In at least one instance, his ruling upon an objection was made during one of these off the record discussions, and such ruling does not appear in the transcript. (R. 972-975). Also during some of these off the record discussions the Trial Examiner became angry with counsel for respondents, so that the true nature of the proceedings and the

actual attitude of the Examiner is not correctly shown by the record.

(d) The Trial Examiner in his rulings upon motions and objections to admissibility of evidence improperly and unfairly favored Board's counsel and case and consistently ruled improperly and unfairly against the respondents and their respective counsel and cases.

(e) E. F. Prior, business representative of the Federal was present throughout practically the entire hearing and although he was not an attorney in the proceeding, he was permitted by the Trail Examiner to sit, and did sit, at the table of Board's counsel and from his actions and conduct it was apparent that he was aiding and assisting Board's counsel in the presentation of the Board's case against respondents. Upon numerous occasions during the hearing the Trial Examiner requested all counsel to come to his bench so he could discuss certain matters with them off the record and on such occasions Prior, although he was a witness for the Board and was not counsel for any of the parties to the proceedings, always went forward and was permitted by the Trial Examiner to participate in such discussions at the bench.

(f) In addition to the matters above specified, the Trial Examiner's prejudice toward respondents is displayed by the partial nature of his Intermediate Report. The Report is replete with exaggerations and misstatements of the evidence—all to the disadvantage of respondents. The Intermediate Report is not in any respect a fair statement of the testimony which

was adduced at the hearing as was clearly shown and demonstrated in the numerous exceptions taken by respondents to that Report. (R. 160-497).

Such conduct as was displayed by the Trial Examiner in this case has been held to be improper in the following cases:

Inland Steel Company v. N. L. R. B. 109 Fed. (2d) 9, 13 (C. C. A. 7, 1940)

Montgomery Ward & Co., v. N. L. R. B. 103 Fed. (2d) 147, 149 (C. C. A. 8, 1939)

N. L. R. B. v. Washington Dehydrated Food Co., 118 Fed. (2d) 980, 982 (C. C. A. 9, 1941)

N. L. R. B. v. Ford Motor Company, 114 Fed. (2d) 905, 909 (C. C. A. 6, 1940)

V.

THE TRIAL EXAMINER ERRED IN HIS RULINGS ON ADMISSIBILITY OF EVIDENCE.

The respondents, both at the time of the hearing and in their statement of exceptions to the Intermediate Report, duly excepted to each and every adverse ruling made by the Trial Examiner on matters relating to the admissibility of evidence and the granting of motions to strike, the great majority of which rulings were clearly erroneous.

The Trial Examiner throughout the hearing permitted the introduction of hearsay testimony by the Board's witnesses, some of which was as much as three or four times removed, over the repeated objections of respondents. In particular the respondents objected and excepted to all testimony relating to conversations

alleged to have occurred between the complaining Federal members, or any of them, and any and all of the alleged supervisory employees of the Boswell Company, upon the ground that such testimony was hearsay and that there was no evidence showing or tending to show any authority was conferred by any of the respondents upon any of the alleged supervisory employees to speak or act for or on behalf of the respondents.

All of the findings in the Intermediate Report based upon such hearsay testimony were duly excepted to upon the same grounds which were urged in support of respondents' objections to the admissibility of such testimony, and upon the ground that all such portions of said findings were unsupported by any competent or credible evidence. (R. 160; 224-229).

Respondents also objected to all testimony given by Dorothy Dunn upon the ground that the Board had no jurisdiction over the Exchange; that the charge filed by Mrs. Dunn had never been served upon any of the respondents; that there was no authority shown or connection between Mrs. Dunn and Prior for the filing of the charge signed and filed by him; that her testimony related to matters and conversations which occurred entirely outside the presence of any of the respondents, and all of which conversations were not in anywise connected with anyone authorized to represent, speak for or bind the respondents and were hearsay and incompetent, irrelevant and immaterial. (R. 1666-1676). Respondents also moved to strike her in-

competent hearsay testimony, and the motions were denied. (R. 1681, 1682).

The respondents also objected to all of Mrs. Dunn's testimony regarding alleged conversations with various parties other than Glenn, upon the ground that it was hearsay and not binding on any of the respondents, there being no connection at all shown beetween the respondents and any of these various persons. (R. 2498, 2499; 2509; 2514-2518; 2521; 2523; 2525; 2527). When the Trial Examiner overruled these objections the respondents duly excepted thereto, both at the hearing and before the Board. (R. 409-416).

Lack of time and space precludes any detailed discussion or specification of the numerous erroneous rulings. Some of these rulings have been previously mentioned in this Brief, and all of them are particularly specified and set forth in the exceptions to the Intermediate Report (R. 160-497).

We will, however, call the court's attention to a few other specific instances in which the Trial Examiner clearly erred in his rulings, to the prejudice of respondents.

Although the Trial Examiner permitted counsel for the Board to introduce hearsay testimony relating to activities taking place at Federal meetings in the absence of the respondents, he consistently refused to permit respondents to establish the identity of persons present when these activities were alleged to have occurred. The complaint alleged that respondent Boswell Company was guilty of unfair labor practices in discharging and discriminating against persons solely

because of their union activities and membership. In spite of this fact, the Trial Examiner refused to permit respondents to elicit information regarding the identity of Federal members in order to show that members of Prior's union who desired employment were still employed without any discrimination. These erroneous rulings of the Trial Examiner are discussed in Exception No. 218, of Exceptions (R. 457-463), and are found in the record at pages 842, 843; 846-849; 1073; 1076; 1106-1107; 1235, 1236; 1588; 1721; 2237-2239. Such rulings have been held to be erroneous in the case of **Montgomery Ward & Co. v. N. L. R. B.,** supra, at page 156 of the decision.

One aggravated instance among the many erroneous rulings of the Trial Examiner was his refusal to require the production of a sworn statement by Prior contained in the charge filed by him on July 17, 1938, which related to some of the matters here in question. In view of the fact that Prior had testified regarding this charge on direct examination, and in view of the fact that a similar charge filed by Mrs. Dunn was introduced by the Board, this ruling of the Trial Examiner constituted a clear refusal on his part to allow the respondents the same latitude as he gave to the Board. The charge in question was without doubt competent for the purpose of impeachment in comparing the former sworn statement of a witness with his testimony on the stand. These particular rulings of the Trial Examiner are discussed in Exception No. 219 of Exceptions (R. 463), and appear in the record at pages 1101-1104 and 1110, 1111.

VI.

THE BOARD'S ORDER IS INVALID AND IMPROPER

The order made by the Board is invalid and improper in the following respects and for the following reasons:

(1) The findings, as hereinabove pointed out, are not supported by substantial evidence and in many respects are contrary to the evidence and therefore do not support the Board's conclusions or order.

(2) The blanket provision in the cease and desist order whereby each of the respondents was restrained from **"in any other manner"** interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join or assist labor organizations, **to bargain collectively** through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act (R. 617, 620) is clearly erroneous and invalid under the facts of this case.

There was no evidence that the alleged unfair labor practices complained of have been so persistent and varied as to justify an apprehension of continued similar and varied efforts in the future to interfere with the empioyees' right of self-organization and collective bargaining. It has been held in many cases that unless the alleged violations have been persistent and similar violations will likely be committed in the future a blanket provision such as that contained in

the Board's order in the instant case is improper and illegal. **N. L. R. B. v. Express Publishing Co., 312 U. S. 426; Press Co. Inc., v. N. L. R. B. (Ct. App. D. C. No. 7482, 1941); N. L. R. B. v. Newark Morning Ledger Co., 120 Fed. (2d) 262, 269 (C. C. A. 3, 1941); N. L. R. B. v. West Texas Utilities, 119 Fed. (2d) 683, 686 (C. C. A. 5, 1941); McQuay-Norris Mfg. Co., v. N. L. R. B., 119 Fed. (2d) 1009, 1010 (C. C. A. 7, 1941); N. L. R. B. v. Swift & Co., 129 Fed. (2d) 222, (C. C. A. 8, 1942).**

Moreover the Board neither charged nor found that either of the respondents violated Section 8 (5) of the Act. This court in **N. L. R. B. v. Pacific Gas & Electric Co., 118 Fed. (2d) 780, 789 (C. C. A. 9, 1941),** modified the Board's cease and desist order by striking therefrom the blanket provision with respect to collective bargaining because no violation of Section 8 (5) had been found.

(3) The Board claims in its Brief (p. 41) that the affirmative provision of the order requiring the Boswell Company to afford its employees reasonable protection in its plant is necessary to prevent physical interruption of their work and physical assaults or threats thereof directed at discouraging union membership. The record shows, however, as previously pointed out, that no special protection was or is required in this regard, as Joe Briley and a number of other Federal members continued to work at the plant without interruption or hindrance following the episode of November 18, 1938.

(4) We have previously pointed out that the

provision in the Board's order requiring Boswell Company to refuse to recognize or deal with the Association is tantamount to an order that the Association be disestablished; that the evidence does not support the Board's findings that the Association is Company dominated or controlled; and that the Association not having been made a party to the proceedings and not having intervened therein, the Board exceeded its authority in making its order in respect to the Association.

(5) We have also previously pointed out that the Board's order that certain former employees be placed on a preferential hiring list is improper and invalid, both because the Boswell Company, as shown by the evidence, did not violate the Act and was not hostile toward the Federal and its members. Furthermore the undisputed evidence shows that a number of the Federal members were re-employed after November 18, 1938, when work was available and they applied for employment.

6. The evidence in this case shows, as previously pointed out, that a number of the Federal members engaged in the picketing of the Boswell plant subsequent to January 23, 1939. The Federal did not institute any strike, and it is apparent that the Federal members who were participating in the picketing activities were not making any effort to find other employment. The Board claims (Brief, p. 44) that respondents are precluded from raising any issue in this enforcement proceeding regarding the Board's failure to find on the matter of what efforts, if any, the employees who were

allegedly discriminated against and discharged have made to secure other and substantially equivalent employment since the termination of their employment with the respective respondents, because this point was not urged by respondents before the Board. The Board contends that the question of potential employment is an affirmative defense which must be put in issue by the respondents, and is not a part of the Board's case. In support of these contentions the Board cites the case of **Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177** and a number of other decisions. We fail to find any language in the **Phelps Dodge** case or in any of the other cases cited by the Board which so holds. There are a number of cases decided after the **Phelps Dodge** decision which clearly hold that the issue of potential earnings is properly raised in connection with the enforcement proceeding, and that the proper procedure for the court when the issue is raised is to remand the question of potential earnings to the Board for further consideration and the production of evidence on that point, and not leave the matter for determination in contempt proceedings. **N. L. R. B. v. Suburban Lumber Co., 121 Fed. (2d) 829, 834 (C.C.A. 3, June 30, 1941); N. L. R. B. v. Newberry Lumber & Chemical Co., 123 Fed. (2d) 831, 839 (C.C.A. 6, December 12, 1941); Corning Glass Works v. N. L. R. B., 129 Fed. (2d) 969, (C. C. A. 2, July 11, 1942).**

7. Respondents are not unmindful of the fact that the Act contains no time-limit mandate to the Board for the rendering of its decisions, and that generally speaking a defense of laches is not available no

matter how long the Board delays its decision unless such delay is wilful or capricious. Manifestly the respondents are placed at a distinct disadvantage, and it is difficult if not impossible for them to establish wilfulness or capriciousness on the part of the Board. In the instant case the original charge against the Boswell Company was filed November 21, 1938 and various amended charges were subsequently filed, and on March 4, 1939 a complaint was issued and the case was set for hearing on March 13, 1939. However, the Board for some unexplained reason did not proceed with the hearing on the date set, but indefinitely continued the same, and the case did not go to hearing until May 18, 1939. The Trial Examiner delayed issuing his intermediate report until January 11, 1940, and said report was not served upon the respondents until January 25, 1940, and the Board did not issue its Decision and Order until September 29, 1941. All of this delay was clearly chargeable to the Board with the exception of a period of approximately thirty days additional time which was granted the respondents within which to file their statement of exceptions and brief. Respondents are not in a position to refute the Board's contention that the delay of approximately two years and four months in deciding the case after it was heard is due to the congestion of the Board's docket. Obviously, however, the effect of this long delay will be extremely prejudicial to each of the respondents should the court uphold the Board's order for reinstatement of certain employees with back pay, and it can logically be presumed that the Board may possibly

have delayed its decision in this case in favor of other cases of greater importance to the Board.

8. Should the court enforce the Board's order for reinstatement of certain of the Boswell Company's employees, it would be extremely difficult, if not impossible, to determine the amount of wages each would have earned had he remained at the plant, in view of the seasonal nature of the Company's operations, and the undisputed and uncontradicted evidence which showed that there was a very substantial normal reduction in the amount of employment and in the number of employees at the plant after the date of termination of employment of each of said employees.

CONCLUSION

It is respectfully submitted:

1. This case should be dismissed as to both respondents on the ground that neither of the respondents is subject to the Act, and that the Board has not and never had jurisdiction.

2. The findings and conclusions of the Board and its orders based thereon are not supported by any substantial evidence as required in cases of this nature, but are based upon hearsay, surmise and suspicion only, and should be vacated and set aside with remand to the Board for further hearing, or the court should substitute for the findings and decision of the Board its own findings and decision which may appropriate-

ly be made upon the record now before the court.

3. It appears by the evidence which has been called to the attention of the court that respondents were each denied a fair and impartial hearing, and each of the respondents was thereby denied due process of law, and the order with respect to each of the respondents should be vacated with remand to the Board for re-hearing, if the case is not dismissed, as it should be on the jurisdictional and other grounds specified in this brief.

Dated: Hanford, California, November 20, 1942.

Respectfully submitted,

SIDNEY J. W. SHARP

M. WINGROVE

Attorneys for Respondents.